

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 138

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
PETITIONER,

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE
AND RUBY G. McCUE, INFANTS, BY MARSHALL W.
WIDDIE, THEIR NEXT FRIEND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1921.
CERTIORARI AND RETURN FILED OCTOBER 20, 1921.

(21,841.)

(21,841.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 338.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
PETITIONER,

vs.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE
AND RUBY G. McCUE, INFANTS, BY MARSHALL DIN-
WIDDIE, THEIR NEXT FRIEND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby G. McCue, Infants, by Marshall Dinwiddie, Their Next
Friend, et al., Plaintiffs in Error,

versus

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Western
District of Virginia, at Lynchburg.

Record Filed April 24th, 1907.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Western District of Virginia:

Pleas in the Circuit Court of the United States for the Western Dis-
trict of Virginia, at Lynchburg, Before the Honorable Henry C.
McDowell, Judge of the District Court of the United States for the
Western District of Virginia, on Saturday, the 24th Day of No-
vember, Anno Domini 1906, and in the 131st Year of the Inde-
pendence of the United States.

In Chancery.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby J. McCue, Infants under the Age of Twenty-one Years,
Who Sue by Marshall Dinwiddie, Their Next Friend, Complain-
ants,

versus

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a Cor-
poration; The People's National Bank of Charlottesville, Vir-
ginia; William H. McCue, Charles M. McCue, Leslie H. McCue,
and E. O. McCue, Executors of James S. McCue, Deceased, De-
fendants.

Be it remembered, that heretofore, to-wit: At a regular term of
the Circuit Court of the United States for the Western District of
Virginia, and Fourth Circuit, begun and held at Danville, within

and for said District and Circuit, on Tuesday, the 14th day of November, A. D., 1905, sitting as a Chancery Court.

2 Hon. Henry C. McDowell, Judge, presiding.
The following proceedings were had in said cause:

Order Docketing the Cause, Removed from the Corporation Court of the City of Charlottesville, Virginia, in the United States Circuit Court Held at Danville, Va., and Removing the Cause from the Danville Court to the United States Circuit Court Held at Lynchburg, Virginia.

In Chancery.

J. WILLIAM McCUE et al., Plaintiffs,

vs.

NORTHWESTERN LIFE INSURANCE Co. et al., Defendants.

This day came the defendants, by counsel, and on motion, the record in the case from the Corporation Court of the City of Charlottesville, Va., is filed, and this case is placed upon the docket of this court, to be herein further heard. On motion of counsel, it is ordered that this case be now removed to this court at Lynchburg, Va., therein to be further heard. Ordered that the clerk of this court send the original papers in the case, with a certified copy of this order, to the clerk of this court at Lynchburg, Va.

A Copy—Teste:

S. W. MARTIN,

[SEAL OF COURT.]

Circuit Clerk.

Transcript of Record of Proceedings Had in Said Cause in the Corporation Court of the City of Charlottesville, Virginia.

Filed November 28, 1905.

VIRGINIA:

Pleas Before the Corporation Court of the City of Charlottesville, at the Court-house Thereof.

Be it remembered, that on the 29th day of September, 1905, came J. William McCue & others, by their attorneys, and made the following memorandum, to-wit:

(Memorandum for Issuing Process.)

SEPTEMBER 29TH, 1905.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and Ruby G. McCue, Infants under the Age of Twenty-one Years, Who Sue by Marshall Dinwiddie, Their Next Friend,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a Corporation; The People's National Bank of Charlottesville, Virginia; William H. McCue, Charles M. McCue, Leslie H. McCue, and E. O. McCue, Executors of James S. McCue, Deceased.

Subpoena in Chancery to Answer Bill Filed for an Attachment.

Make process and attachment to the October Term, 1905, of the Corporation Court of Charlottesville, Va.

The clerk of the above court is required by the plaintiff to issue an attachment in equity, returnable to the October Term, 1905, of said court, and to endorse on the summons and order to the officer to whom it is directed, to attach the estate and effects of the said The Northwestern Mutual Life Insurance Company in the hands of the People's National Bank of Charlottesville, and also the debts owing to the said Northwestern Mutual Life Insurance Company by the said People's National Bank of Charlottesville, Virginia, who are hereby designated as being in possession of estate and effects of, or being indebted to the said Northwestern Mutual Life Insurance Company; and also to attach any other estate of the said Northwestern Mutual Life Insurance Company, whether in his own hands or in the hands of the other defendants, or either of them.

Direct original and one copy to the Sergeant of the City of Richmond, Virginia.

WALKER & SINCLAIR &
D. HARMON, p. q.

(Subpoena in Chancery.)

The Commonwealth of Virginia to the Sergeant of the City of Charlottesville, Greeting:

We command you to summon The Northwestern Mutual Life Insurance Company; The People's National Bank of Charlottesville, Virginia; William H. McCue, Charles M. McCue, Leslie H. McCue and O. E. McCue, executors of James S. McCue, deceased, to appear at the clerk's office of our Corporation Court of the City of Charlottesville, at the October Term, 1905, next, to answer a bill in chancery exhibited against them in our said court by J. William McCue, Samuel O. McCue, Harry M. McCue & Ruby G. McCue, infants under the age of twenty-one years, who sue by Marshall Dinwiddie, their next friend.

You are also commanded to notify the said defendants that unless they shall answer the said bill within the time prescribed by law, that the same will be taken for confessed, and the court will decree accordingly.

And have then here this writ.

Witness, Richard W. Duke, Clerk of our said Court, this 29th of Sept., 1905, in the 130th year of the Commonwealth.

R. W. DUKE, *Clerk.*

(Memorandum for Attachment.)

Endorsement on back.

Affidavit in this suit having been made as required by law at the requisition of the plaintiffs, the officer to whom this writ is directed is hereby ordered to attach the estate of the said The Northwestern Mutual Life Insurance Company, especially the following estate, to-wit: Such estate and effects as are in possession of the Peoples National Bank of Charlottesville, Virginia, and such debts as are owing by the said Peoples National Bank to the said The Northwestern Mutual Life Insurance Company, and also any other estate or debts belonging to or owing to the said The Northwestern Mutual Life Insurance Company, whether in his own hands or in the hands of any other defendants, or so much thereof as may be necessary to satisfy the amount of fifteen thousand dollars and interest claimed in this suit and the subject to keep to answer the future order of this court.

And the said The Peoples National Bank of Charlottesville, Virginia, who are designated as being in possession of estate or effects of or being indebted to the said The Northwestern Mutual Life Insurance Company are hereby required to appear before our Corporation Court of the City of Charlottesville at the October Term, 1905, and disclose on oath in what sum or sums they are indebted to the said The Northwestern Mutual Life Insurance Company, or what estate or effects of said company they have in their possession.

5 And the said officer shall have then and there this attachment.

Teste:

R. W. DUKE, *Clerk.*

(Return of Sergeant of City of Charlottesville, Va.)

Executed Sept. 29th, 1905, on "The Peoples National Bank of Charlottesville, Va., by delivering a true copy of the within writ, with endorsement thereon, to J. M. Robertson, cashier of said bank, in person. Said service was made in the City of Charlottesville, Va., where the said J. M. Robertson, cashier, resides, and has his place of business.

C. W. ROGERS,
Serg. of Charlottesville, Va.

(Subpoena in Chancery.)

The Commonwealth of Virginia to the Sergeant of the City of Richmond, Va., Greeting:

We command you to summon The Northwestern Mutual Life Insurance Company; The People's National Bank of Charlottesville, Virginia; William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, to appear at the clerk's office of our Corporation Court of the City of Charlottesville, at the October Term, 1905, next, to answer a bill in chancery exhibited against them in our said court by J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants under the age of twenty-one years, who sue by Marshall Dinwiddie, their next friend.

You are also commanded to notify the said defendants that unless they shall answer the said bill within the time prescribed by law, that the same will be taken for confessed, and the court will decree accordingly.

And have then here this writ.

Witness, Richard W. Duke, Clerk of our said Court, this 29th of Sept., 1905, in the 130th year of the Commonwealth.

R. W. DUKE, *Clerk.*

*(Memorandum for Attachment.)***Endorsement on back.**

Affidavit in this suit having been made as required by law at the requisition of the plaintiffs, the officer to whom this writ is directed is hereby ordered to attach the estate of the said The Northwestern Mutual Life Insurance Company, especially the following estate, to-wit: Such estate and effects as are in possession of the Peoples National Bank of Charlottesville, Virginia, and such debts as are owing by the said Peoples National Bank to the said The Northwestern Mutual Life Insurance Company, and also any other estate or debts belonging to or owing to the said The Northwestern Mutual Life Insurance Company, whether in his own hands or in the hands of any other defendants, or so much thereof as may be necessary to satisfy the amount of fifteen thousand dollars and interest claimed in this suit and the subject to keep to answer the future order of the court.

And the said The Peoples National Bank of Charlottesville, Virginia, who are designated as being in possession of estate or effects of or being indebted to the said The Northwestern Mutual Life Insurance Company are hereby required to appear before our Corporation Court of the City of Charlottesville at the October Term, 1905, and disclose on oath in what sum or sums they are indebted to the said The Northwestern Mutual Life Insurance Company, or what estate or effects of said company they have in their possession.

And the said officer shall have then and there this attachment.
 Teste:

R. W. DUKE, *Clerk.*

(Return of Sergeant of City of Richmond, Va.)

Executed September 30th, 1905, on the Northwestern Mutual Life Insurance Company by delivering a copy of the hereto attached summons to T. Archibald Carey in the City of Richmond, Virginia, where he resides, he being the statutory agent of said company appointed as such by a written power of attorney filed with the Auditor of Public Accounts of the State of Virginia upon whom all process may be executed.

J. C. SMITH,
Sergeant City of Richmond.
 By J. M. MACON, D. S.

7 *(Attachment Against Estate of The Northwestern Mutual Life Insurance Company.)*

The Commonwealth of Virginia to the Sergeant of the City of Richmond, Va., Greeting:

Whereas, J. William McCue, Samuel O. McCue, Ruby G. McCue and Harry M. McCue, by Marshall Dinwiddie, their next friend, instituted in our Corporation Court of the City of Charlottesville, a certain suit in chancery for an attachment against The Northwestern Mutual Life Insurance Company and The Peoples National Bank of Charlottesville, and William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue deceased, which suit is now pending in the said court; and there having been filed in the clerk's office of our said court an affidavit that the claim of said plaintiff asserted in the said suit is believed to be just, that the affiant believes the plaintiffs are entitled to or ought to recover \$15,000.00, with interest from 22nd Feb'y, 1905, till paid, at the least, with interest thereon to be computed after the rate of six per centum per annum from the 22nd day of February, 1905, till payment, and that to the best of the said affiant's belief the said defendant, The Northwestern Mutual Life Insurance Company:

I. *It is a foreign corporation, and has estate or debts owing to said defendant within the City of Charlottesville, in which the suit is, and is sued with a defendant residing therein.*

Therefore we command you that you attach the estate of the said The Northwestern Mutual Life Insurance Company for the amount of the said claim, with interest thereon, as aforesaid, and the costs, and that you secure such estate so attached in your hands, or so provide that the same may be forthcoming and liable to further proceedings thereupon to be had before our said court at the November, 1905, term thereof, and that you make return thereof at *or* the said term on the — next how you have executed the same.

And have then and there this writ.

Witness, R. W. Duke, Clerk of our said Court, at the Court-house, the 11th day of October, 1905, in the 130th year of the Commonwealth.

R. W. DUKE, *Clerk.*

Endorsement on the Back.

8 The plaintiffs designate T. Archibald Cary and E. L. Carroll as being in possession of effects of, or being indebted to the defendant, The Northwestern Mutual Life Insurance Company.

D. HARMON,
WALKER & SINCLAIR,
Att'ys for Plaintiffs.

(*Notice to Archibald Cary and E. L. Carroll to Disclose Their Indebtedness, &c., to The Northwestern Mutual Life Insurance Company.*)

T. Archibald Cary and E. L. Carroll are required to appear at November Term, 1905, Corporation Court, City of Charlottesville, and disclose on oath separately in what sum *he is* indebted to, or what effects *he has* in *his* possession belonging to the said The Northwestern Mutual Life Insurance Company.

R. W. DUKE, *Clerk.*

(*Return of Sergeant of City of Richmond, Va.*)

Executed October 15th, 1905, on T. Archibald Cary in person by deliver- to him, a true copy of the within writ in *the within writ* in the City of Richmond, Va., with endorsement thereon.

J. M. MACON,
Deputy for J. C. Smith, Sergeant City of Richmond, Va.

(*Bill in Chancery.*)

To the Honorable George W. Morris, Judge of the Corporation Court for the City of Charlottesville, Virginia:

Your complainants, J. William McCue, Samuel O. McCue, Harry M. McCue, and Ruby G. McCue, infants under the age of twenty-one years, who sue by Marshall Dinwiddie, their next friend, respectfully represent to the court that they are children and sole heirs of James S. McCue, deceased.

The Northwestern Mutual Life Insurance Company is a foreign corporation, existing under and by virtue of a statute law of the State of Wisconsin, enacted for the purpose of incorporating said company.

9 By the terms of said statute, Thomas Lappin and thirty-four others, together with all other persons who should thereafter become associated with them, in the manner prescribed by the

said charter of incorporation, were declared a body politic and corporate by the name of "The Northwestern Mutual Life Insurance Company," and by that name empowered to contract and be contracted with, sue and be sued, defend and be defended against, in any and all courts. It is averred that no power or privileges and no immunities were granted them except those expressly granted in said charter.

The said company is, and for many years prior to the date hereinafter specifically referred to, was, a strictly Mutual Life Insurance Company, with the rights and subject to all liabilities of a Mutual Insurance Company.

It is alleged that the persons referred to in the charter of incorporation as those who might, after the enactment thereof, become associated with the said Thomas Lappin and others, were those who became members of the said company. Membership in the said company was acquired by effecting insurance therein on one's life, and by the aforesaid charter of the said company the heirs of persons insured therein are made members thereof, and by reason of their membership, said heirs, on the death of such insured person, become beneficially interested in and entitled to a share of all the property and assets of the said corporation to the extent of the amount designated in the policy in case there is no person named in said policy who can recover the said amount.

It is further alleged, that by the terms of the said statute and charter of incorporation, the whole body of persons associated together at any given time as members constituted the corporation created by the said Act, and as such were authorized and empowered, by the express terms of said charter, to insure the lives of its respective members and to make any and every insurance appertaining to and connected with life risks, and to grant and purchase annuities.

The business and affairs of the said company were managed entirely by the members thereof through a Board of Trustees elected and controlled by them. The provisions of the charter bearing on this subject were in substance and effect as follows:

Any member under the law is eligible to the office of trustee, who had taken out a policy of insurance for at least \$5,000, which should be in force and on which the premium or dues were paid for at least one year. An insurance policy of \$1,000 permitted any member to vote, and each member was entitled to one vote for each \$1,000 of insurance in force at the time of the election.

10 It is provided by the charter that suits might be prosecuted and maintained by a member against the said corporation for loss by death if payment should be withheld for more than three months after the said company was duly notified of such loss.

The company has at no time had a capital stock of any sort, but has a large amount of assets, including a surplus and reserve fund which has been derived from premiums and assessments paid by its members, which said surplus and reserve fund and all other assets of the said company belong to the members of the said company, including those who were entitled to the benefits of its policies, as

the same become payable, and the amount of the interest belonging to each is fixed by the amount named in the certificates of membership, to-wit, the policy of insurance.

Your complainants would further aver that on the 15th day of March, 1904, the said James S. McCue, at the solicitation of said company, procured a policy therein, No. 576576, for the sum of \$15,000.00 by taking out and paying for the same as required by the charter of said company, which said policy bears date the 14th day of March, 1904, and is duly executed in the name and on behalf of the said company by its proper officers, and on the said last mentioned date the said James S. McCue paid to the said company the sum of \$142.50, premium for six months on said policy of insurance, and said policy was then delivered to him, and afterwards, to-wit, on the — day of May, 1904, the said James S. McCue paid to the said Northwestern Mutual Life Insurance — the further sum of \$285.00, the premium and assessment made on the said policy of insurance for one year from the 15th day of September, 1904, to the 15th day of September, 1905.

By the said policy of insurance the Northwestern Mutual Life Insurance Company became bound to pay to such beneficiaries or beneficiary of the said James S. McCue, as might, after the date of the said policy, be nominated by him thereunder, the sum of fifteen thousand dollars, upon receipt and approval of proofs of the fact and cause of death, if such death occurred within the period of ten years from the date thereof. The said policy further provided that if no beneficiary survived the insured, then payment to be made to the executors, administrators or assigns of the deceased. No beneficiary was in fact named in accordance with the terms of said policy, and there was no assignment thereof, and complainants allege and charge, that it was, as was well known to said James S. McCue, competent for a person taking out a policy of insurance in the said company, to name a beneficiary either absolutely or conditionally, or he could leave such member of the said company as became
11 beneficially interested therein to his rights, as member of the said company under and by virtue of the said law incorporating it.

On the 10th day of February, 1905, the said James S. McCue departed this life by being executed, and your complainants aver that at the time of his death, the said James S. McCue had paid in full all the premiums and assessments due or to become due under the said policy of insurance, and had, in all things, done and performed everything that was obligatory upon him to be done and performed as required by the said policy and by the charter of the said company, and at the time of the death of the said James S. McCue, said policy of insurance was in full force and effect.

Your complainants further aver that afterwards, to-wit, on the 20th day of February, 1905, W. H. McCue, C. M. McCue, L. H. McCue and E. O. McCue were appointed and qualified as executors of the said James S. McCue; since their said appointment and qualification the said executors and each of them have informed your complainants that they are claimants of the amount of insurance

provided for by the said policy belonging, as your complainants allege, solely and alone to them.

Complainants further aver that afterwards, to-wit: On the 22nd day of February, 1905, proof of the fact and cause of death of said insured, while the said policy was in force as required by the said company, was duly received and approved by the said company.

Complainants allege and charge that the said Northwestern Mutual Life Insurance Company has in its charge and under its control now, and at the time of the death of the said James S. McCue, had assess applicable to the payment of your complainants' claim exceeding many times the amount of the insurance policy herein referred to, derived wholly and entirely from the dues, premiums and assessments paid in by its members, the said assets belonged to the members of said company in proportion to the respective amounts of the policies issued against said fund, so made up and held as surplus and reserve fund, including a death loss fund derived from the same source. There were no provisions, stipulations or conditions in the said charter or in the policy aforesaid other than those herein set out affecting the rights of the parties in the premises, and your complainants, by the Statute law of the State of Wisconsin, under the charter aforesaid, immediately upon the death of the said James S. McCue, became members of the said company beneficially interested therein and entitled to a share of said assets to the extent of the said policy of insurance, with rights not subject to be defeated by the claims of the said executors or by the said company or by any other person.

12 Your complainants are advised and charged that the true construction and meaning of the said policy and the intention of the said parties in affecting the same, was for your complainants to receive the proceeds thereof.

The condition under which the executors were to take the proceeds of said policy never occurred. This condition required the designation of a beneficiary by the policy, and that the assured should survive the beneficiary so designated. This was not done, no such beneficiary was designated, hence he did not and could not survive any beneficiary, and therefore the condition precedent to the title of the said executors was never performed.

It is alleged that this was a condition which the said James S. McCue had the right to impose. There was nothing, and there is nothing in the charter, statute or by-laws of the said company, or in the said policy, restricting his right in this respect, and he at all times had the right to name a beneficiary to the said policy or to leave it to the charter of the company of which he was a member to determine who should be the beneficiary.

Under these circumstances, the charter and the statute hereinbefore referred to fixed and determined such beneficiary to be your complainants. But even if this was otherwise, if the said James S. McCue had not, as he had the right to do, contemplated leaving to the terms of said statute and charter to fix and determine the beneficiary of the said policy of insurance, your complainants would still

have been entitled to the proceeds thereof under the charter had there been an unsuccessful attempt to designate a beneficiary.

Your complainants are advised and charge, that the said Northwestern Mutual Life Insurance Company claims that there is some principle of public policy, growing out of the manner of the death of the said James S. McCue, which operates as a forfeiture, for the benefit of said company, and affords them immunity from this obligation.

Your complainants deny that there is any principle of public policy which can affect their rights, and they are advised and charge that it can make no practical difference to them whether there is any principle of public policy or not which can affect the title of the said executors in regard to this insurance.

The executors are before the court to protect any claim they may have in the premises. If your Honor should determine that the said executors have title thereto, they would hold the same for the benefit of your complainant, for it is averred that the estate of said James S.

McCue is entirely solvent, what debts he left have either been
13 paid or their payment provided for, so that if the executors should have any title, your complainants would be the ultimate beneficiaries of the whole of said amount.

While if your Honor should determine that by the terms of this policy the executors are designated as the persons entitled to recover, but that public policy forbids payment to be made to any one claiming under the said James S. McCue, the results of this would only be to make the title of your complainants complete, and to afford the means by which they would become entitled to recover. There is no principle which would entitle the said company, under the circumstances of this case, to retain the amount, and upon a failure to the title of the executors, the case would stand just as a case where there was a designation in the policy of a beneficiary who could not lawfully take, or a failure or unsuccessful attempt, to designate a beneficiary, in the policy.

In such case your Honor would look to the charter to discover the person entitled to the benefits. The said charter in manner and form as aforesaid, clearly points out your complainants as members of the company entitled to recover.

By reason of their membership as aforesaid in said company, your complainants, upon the death of said James S. McCue became interested in and entitled to their proper proportion and share of all the property and assets of said corporation, to the extent of the amount designated in the said policy of insurance, and such being the case, the funds of the said company are trust funds for the mutual benefit of all the members of the said corporation, including those who became members by reason of being heirs of such persons whose lives were insured. There was no assignment of the said policy of insurance, there was no successful designation of a beneficiary therein, and therefore no one except your complainants ever became beneficially interested therein, as the condition under which the said executors were entitled to claim the proceeds of the said policy never occurred, and there is no provision anywhere by which the company

can benefit by the death of the said James S. McCue or in any manner become his beneficiary, either under the policy or under the charter.

Your complainants therefore aver that they are entitled to recover of the said company the amount of said policy of insurance, to-wit: (\$15,000.00) fifteen thousand dollars, with interest thereon at the rate of six per cent. per annum from the 22nd day of February, 1905, until paid.

Your complainants aver that the provisions in the aforesaid charter and policy were framed to induce people to become members of it, and the liberal provisions were held out to the said James S. McCue as an inducement, and did induce him, to take out said insurance.

Complainants further aver that there is no provision in the said policy or charter exempting or tending to exempt the said company from the liability here asserted.

Being so indebted to them as aforesaid, and although your complainants have often requested the said Northwestern Mutual Life Insurance Company to pay to them the amount of said insurance policy, with its interest as aforesaid, the said company hath hitherto and still refuses and declines so to do.

Your complainants aver that their claim as hereinbefore set out is believed to be just; that they believe they are entitled to and ought to recover from the said The Northwestern Mutual Life Insurance Company at least the sum of fifteen thousand dollars (\$15,000.00), with interest thereon from the 22nd day of February, 1905, until paid; that the said The Northwestern Mutual Life Insurance Company is a foreign corporation, and has estate or debts owing to them in the City of Charlottesville, in which this suit is and is sued with a defendant residing therein.

Complainants further aver that the Peoples National Bank of Charlottesville, Virginia, is indebted to and has in its possession estates and effects belonging to the said The Northwestern Mutual Life Insurance Company.

Forasmuch, therefore, as these things are contrary to equity and good conscience, and your complainants are without adequate remedy, save in a court of equity, where all such matters are properly cognizable, they pray that the said Wm. H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, and The Northwestern Mutual Life Insurance Company, a corporation, and the Peoples National Bank of Charlottesville, Virginia, be made parties defendant to this suit and be required to answer the same, but not under oath, affidavit to any answer by said defendants being expressly waived, except as to disclosures required to be made by the said Peoples National Bank; that an attachment issue against the said Peoples National Bank of Charlottesville, Va., to secure and enforce complainants' claim, and that the said Peoples National Bank of Charlottesville, Va., be required to disclose on oath what estate or effects of the said The Northwestern Mutual Life Insurance Company it has in its hands belonging to said company, or in what sum it may be indebted to said com-

pany, that the said estate, effects and debts be subjected to secure and enforce complainants' claim, and that other attachments may issue from time to time as occasion shall require.

15 That complainants recover from the said The Northwestern Mutual Life Insurance Company the sum of (\$15,000.00) fifteen thousand dollars, with interest thereon as aforesaid; that all such further and general relief may be accorded complainants as is agreeable to the nature of their case and adapted to a court of equity.

And your complainants will ever pray, etc.

J. WILLIAM McCUE,
SAMUEL O. McCUE,
HARRY M. McCUE,
RUBY G. McCUE,

*Who Sue by Their Next Friend, Marshall Dinwiddie,
by Counsel.*

WALKER & SINCLAIR,
DANIEL HARMON, p. q.

VIRGINIA,

City of Charlottesville, To wit:

This day Daniel Harmon, attorney for the plaintiffs in this suit, personally appeared before me in my office & made oath according to law that the statements contained in the said bill are true to the best of his knowledge, information & belief.

Given under my hand this 29th day of September, 1905.

R. W. DUKE, *Clerk.*

*Petition for Removal from the Corporation Court of the City of
Charlottesville to the Circuit Court of the United States for the
Western District of Virginia.*

STATE OF VIRGINIA, To wit:

In the Corporation Court of the City of Charlottesville.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE and
RUBY G. McCUE, Infants under the Age of Twenty-one Years,
Who Sue by Marshall Dinwiddie, Their Next Friend,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et als.

*Petition for Removal from the Corporation Court of the City of
Charlottesville to the Circuit Court of the United States for the
Western District of Virginia.*

To the Honorable George W. Morris, Judge of the Court aforesaid:

16 Your petitioner, the Northwestern Mutual Life Insurance
Company, respectfully shows unto this Honorable Court that
it is one of the defendants named in the above entitled cause, and

that it was at the time of the commencement of the said suit, and still is, a corporation created, organized and existing under the laws of the State of Wisconsin, and was then, and still is, a resident of the said State of Wisconsin, and was not then, and is not now, a citizen or resident of the State of Virginia; that, as your petitioner is informed and believes, the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants under the age of twenty-one years, and the said Marshall Dinwiddie, by whom they sue as their next friend, the parties named as plaintiffs in this suit, were, at the time of the bringing of this suit, and still are, citizens and residents of the State of Virginia; that the People's National Bank of Charlottesville, Virginia, a corporation, created, organized and existing under the laws of the United States, which is named as one of the defendants in this suit, was, at the time of the bringing of the said suit, and is now, located and doing business at Charlottesville, in the said State of Virginia; that William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, who are also named as defendants in this suit, were at the time of the bringing of the same, and still are, citizens and residents of the State of Virginia;

That the matter in dispute therein and in that portion of this cause in which your petitioner is interested, exceeds, exclusive of interest and costs, the sum of value of two thousand (2,000) dollars; that said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states, and is between them alone, and which can be fully determined as to them without the intervention of any other parties.

The said controversy wherein your petitioner is alone interested is of the following nature, viz.:

"In consideration of the statements and agreements made in the application for this policy, which is hereby made a part of this contract, and in further consideration of the payment of two hundred and eighty-five dollars, and of the annual payment of a like sum to the said company, at or before twelve o'clock noon on or before the

15th day of September, in every year during the continu-

17 ance of this policy, promises to pay at its office in Milwaukee, Wisconsin, unto such beneficiary or beneficiaries of James S. McCue, the insured, of Charlottesville, in the State of Virginia, as may hereafter be nominated under this contract, subject to the right of the insured to change the beneficiary or beneficiaries as hereinafter provided, the sum of fifteen thousand dollars, upon receipt and approval of proofs of the fact and cause of the death of said insured while this policy is in force, if such death shall occur within the period of ten years from the date hereof, the balance of the year's premium, if any, and any other indebtedness to the company on account of this policy being first deducted therefrom; provided, however, that if no beneficiary shall survive the said insured, then such payment shall be made to the executors, administrators or assignees of the said insured."

Which said application and policy of insurance are herewith filed,

marked respectively Exhibits No. 1 and 2, and prayed to be taken as a part of this petition.

That no beneficiary was named in the said policy during the life time of the insured, and therefore no beneficiary survived the insured; that, as your petitioner is informed and believes, the insured, the said James S. McCue, was, on the 10th day of February, 1905, executed in the said City of Charlottesville under a judgment of the said Corporation Court of the City of Charlottesville for the murder of his wife; that on the 20th day of February, 1905, William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue were appointed and duly qualified as executors of the will of the said James S. McCue; that as such executors, they filed with your petitioner certain papers or statements termed the proofs of the death of the said James S. McCue, and thereby and therein demanded payment to themselves as such executors, of the said fifteen thousand dollars named in the said policy, as will appear from a copy of the said so-called proofs of loss herewith filed, marked Exhibit No. 3, and prayed to be taken as a part of this petition;

That as your petitioner is informed and believes, the said executors, having failed in their demand upon this company to recover the said amount of fifteen thousand dollars named in the said policy, have, through the same attorneys, who made the said demand for them, inaugurated this suit, and have filed the bill of complaint herein, wherein the said infant heirs of the said James S. McCue are set forth as the plaintiffs, while they, the said executors, have in the said complaint set themselves forth as defendants therein; that

the said bill of complaint does not state any cause or action
18 against the said executors as defendants, but on the contrary, it alone seeks to recover from this petitioner the said sum of fifteen thousand dollars named in the said policy as the amount of insurance on the life of the said James S. McCue, deceased.

Your petitioner therefore avers that this suit is one in which there can be a final determination of the only true controversy between it and the only true complainants, without the presence of any of the said executors as parties defendant in this cause. The said executors named as defendants are, in fact, only nominal defendants, against whom no relief is sought in this action, and if the said executors have any interest in the present suit, their interest is identical with that of the complainants, namely, the said infant children of the said James S. McCue.

Your petitioner avers that it is apparent from the said policy of insurance herewith filed and herein quoted from, that the only and true controversy involved in this cause is the claim against this petitioner for the amount of the said policy of insurance on the life of the said James S. McCue, and that whether the said infant heirs are the only true plaintiffs, or the executors the only true plaintiffs, or both are plaintiffs, the real and only controversy involved in this cause is the claim against your petitioner for the amount of said policy, and in that respect the interest of the infant heirs named in this cause as plaintiffs, and the said executors named in this cause as defendants, is one and the same, being absolutely identical.

Your petitioner further avers that the said executors are not only formally defendants, but are deliberately made such defendants for the express purpose of depriving your petitioner of its right to remove this cause from this Honorable Court to the Circuit Court of the United States for the Western District of Virginia.

Your petitioner further avers that The People's National Bank of Charlottesville, Virginia, named as one of the defendants, has no interest in this controversy or in the said policy of insurance, but was, as is expressly alleged in the bill of complaint, only a garnishee and therefore a nominal and not a real party to the controversy.

Wherefore your petitioner avers and insists that the only true controversy involved in this suit is wholly between citizens of different States, and between them alone, namely, between the said heirs of the said James S. McCue, deceased, or between his said executors, or between both, and your petitioner, and therefore, without the presence of any of the said executors or of any other persons as parties defendant in this cause.

19 If, however, there should be any other controversy or cause of action set up in the bill of complaint, then it is one solely between the said infant heirs and the said executors, viz.: whether the amount of said policy, when collected, shall be administered as a part of the estate of the insured or pass to the said infants directly as a part of their own estate; in which controversy, if any such really exists, your petitioner has no interest whatever, and one which can only arise after liability of your petitioner under said policy has been judicially ascertained, and also one which can and should be heard and decided separate from and independent of that in which your petitioner is interested.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in the Circuit Court of the United States for the Western District of Virginia, on the first day of its next session a copy of the record in the same suit, and for paying all costs which may be awarded by said Circuit Court, if such court should hold that this cause is wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept such bond and surety and to cause the record herein to be removed into the said Circuit Court of the United States for the Western District of Virginia.

And it will ever pray, etc.

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

[SEAL.] By H. L. PALMER, *Its President.*

WHITE, TUNSTALL & WILLCOX,
Counsel for Petitioner.

STATE OF WISCONSIN,
County of Milwaukee, To wit:

H. L. Palmer says that he is president of the Northwestern Mutual Life Insurance Company, and makes oath that the foregoing

petition is true to his knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters, he believes the same to be true.

H. L. PALMER.

20 Sworn to and subscribed before me this 14th day of October, 1905.

My commission expires March 4, 1906.

[SEAL.]

W. J. HOLBROOK,
Notary Public, Milwaukee County, Wisconsin.

(Certificate of Clerk of Circuit Court of County of Milwaukee, Wisconsin.)

STATE OF WISCONSIN,
County of Milwaukee, ss:

Office of the Clerk of the Circuit Court.

I, A. A. Wieber, Clerk of the Circuit Court of the County of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that W. J. Holbrook, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof a Notary Public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such, full faith and credit is and ought to be given in court and out.

I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine, that the seal hereto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Milwaukee, in the county and State, on the 14th day of October, one thousand nine hundred and five.

[SEAL.]

A. A. WIEBER,
Clerk of Circuit Court.

(Bond for Removal of Cause.)

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
 Ruby G. McCue, Infants under the Age of Twenty-one Years,
 Who Sue by Marshall Dinwiddie, Their Next Friend,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et als.

*Petition for Removal from the Corporation Court of the City of
 Charlottesville to the Circuit Court of the United States for the
 Western District of Virginia.*

Know all men by these presents: That T. A. Cary, as principal, and John S. White and Wm. H. White, as surety, are holden and stand firmly bound unto the said above-named complainants in the penal sum of three hundred dollars, for the payment whereof well and truly to be made unto the said complainants, their heirs, representatives and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said The Northwestern Mutual Life Insurance Company has filed its petition in the Corporation Court of the City of Charlottesville, in the State of Virginia, for the removal of a certain cause therein pending, wherein J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants under the age of twenty-one years, who sue by Marshall Dinwiddie, their next friend, are plaintiffs, and the said The Northwestern Mutual Life Insurance Company and others are defendants, to the Circuit Court of the United States in and for the Western District of Virginia.

Now, if the said The Northwestern Mutual Life Insurance Company shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit is wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 14th day of October, A. D., 1905.

T. A. CARY. [SEAL.]
 JNO. S. WHITE. [SEAL.]
 WM. H. WHITE. [SEAL.]

STATE OF VIRGINIA,

City of Richmond, To wit:

T. A. Cary maketh oath and states that he resides in Henrico Co., in the State of Virginia; that he is a freeholder therein, and is worth the sum of three hundred dollars, over and above all property exempt from sale on execution.

Subscribed and sworn to before me this 14th day of October, in the year 1905.

H. L. CABELL,

Notary Public in and for Richmond, State of Virginia.

My commission expires Dec. 3, 1905.

STATE OF VIRGINIA,

City of Charlottesville, To wit:

John S. White maketh oath and states that he resides in Albemarle County, in the State of Virginia; that he is a freeholder therein, and is worth the sum of three hundred dollars over and above all property exempt from sale on execution.

Subscribed and sworn to before me this 16th day of October, in the year 1905.

GERTRUDE COLEMAN MANN,

Notary Public in and for Charlottesville,

State of Virginia.

My commission expires Sept. 23, 1906.

STATE OF VIRGINIA,

City of Charlottesville, To wit:

Wm. H. White maketh oath that he resides in Norfolk, in the State of Virginia; that he is a freeholder therein, and is worth the sum of three hundred dollars over and above all property exempt from sale on execution.

Subscribed and sworn to before me this 16th day of October, in the year 1905.

GERTRUDE COLEMAN MANN,

Notary Public in and for Charlottesville,

State of Virginia.

My commission expires Sept. 23, 1906.

23 *(Order of Removal of Cause to Circuit Court of United States for Western District of Virginia.)*

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and Ruby G. McCue, Infants under the Age of Twenty-one Years, Who Sue by Marshall Dinwiddie, Their Next Friend,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et als.

Petition for Removal from the Corporation Court of the City of Charlottesville to the Circuit Court of the United States for the Western District of Virginia.

The defendant, The Northwestern Mutual Life Insurance Company, having, within the time provided by law, filed its petition for removal of this cause to the Circuit Court of the United States for the Western District of Virginia, and having at the same time offered

a bond in the sum of three hundred dollars with T. A. Cary, Jno. S. White and Wm. H. White, good and sufficient surety, pursuant to the statute and conditioned according to law;

Now, therefore, this court does hereby accept and approve said bond and accept said petition, and it is ordered that this cause be removed for trial to the Circuit Court for the United States for the Western District of Virginia, pursuant to the statute of the United States, and that all other proceedings in this court be stayed.

(Certificate of Clerk of Corporation Court of City of Charlottesville, Virginia.)

COMMONWEALTH OF VIRGINIA,

Corporation of the City of Charlottesville, To wit:

I, R. W. Duke, Clerk of the Corporation Court of the City of Charlottesville, in the State of Virginia, do hereby certify that the foregoing and annexed writing is a true and complete copy of the record of the cause of J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants under the age of twenty-one years, who sue by Marshall Dinwiddie, their next friend, against The Northwestern Mutual Life Insurance Company, The Peoples

24 National Bank of Charlottesville, Va., William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, and T. Archibald Cary, taken from the records of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, this 27th day of October, A. D., 1905, in the 130 year of the Commonwealth of Virginia.

[SEAL OF COURT.]

R. W. DUKE,

*Clerk of the Corporation Court of the
Corporation of the City of Charlottesville.*

(Certificate of Judge of Corporation Court of Charlottesville, Virginia.)

COMMONWEALTH OF VIRGINIA,

Corporation of the City of Charlottesville, To wit:

I, George W. Morris, Judge of the Corporation Court of the City of Charlottesville, in the State of Virginia, do certify that R. W. Duke, who hath given the preceding certificate, is clerk of said court, and that his said attestation is in due form.

Given under my hand this 27th day of October, A. D., 1905.

GEO. W. MORRIS,

*Judge of the Corporation Court of said
City of Charlottesville.*

*(Certificate of Clerk of Corporation Court of City of Charlottesville,
Virginia.)*

COMMONWEALTH OF VIRGINIA,

Corporation of the City of Charlottesville, To wit:

I, R. W. Duke, Clerk of the Corporation Court of the said City of Charlottesville, in the State of Virginia, do hereby certify that George W. Morris, whose genuine signature appears to the certificate above, is the only judge of the said Corporation Court, and that all his official acts as such, are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, this 27th day of October, A. D., 1905, in the 130 year of the Commonwealth of Virginia.

[SEAL OF COURT.]

R. W. DUKE,

*Clerk of the Corporation Court of the
Corporation of the City of Charlottesville.*

25 EXHIBIT "No. 1" FILED WITH PETITION FOR REMOVAL OF
CAUSE.

Filed November 28, 1905.

(Policy of Insurance.)

The Northwestern Mutual Life Insurance Company,

Number.	Age.
576,576.	43.
Amount.	Premium.
\$15,000.	By this Policy of Assurance, \$285.00.

In consideration of the statements and agreements made in the application for this Policy, which is hereby made a part of this contract, and in further consideration of the payment of two hundred and eighty-five dollars, and of the annual payment of a like sum to the said company, at or before twelve o'clock noon on or before the 15th day of September, in every year during the continuance of this Policy, promises to pay, at his office in Milwaukee, Wisconsin, unto such Beneficiary or beneficiaries of James S. McCue, the insured, of Charlottesville, in the State of Virginia, as may hereafter be nominated under this contract, subject to the right of the insured to change the Beneficiary or Beneficiaries as hereinafter provided, the sum of fifteen thousand dollars, upon receipt and approval of proofs of the fact and cause of the death of said insured while this policy is in force, if such death shall occur within the period of ten years from the date hereof, the balance of the year's premium, if any, and any

other indebtedness to the company on account of this Policy being first deducted therefrom; provided, however, that if no Beneficiary shall survive the said Insured, then such payment shall be made to the executors, administrators or assigns of the said Insured.

At the expiration of the full term of this Policy it may be renewed for successive ten year periods without medical re-examination, on condition that at least thirty days before the expiration of each term the Insured shall give written notice to the Company of his desire to renew and at each renewal the premium shall be increased to correspond with the Company's present published rate for the then age of the Insured; at each such renewal, however, this Policy shall share in the surplus contributed by policies of its class according to its contribution of such surplus, but each such dividend to which it may become entitled shall be allowed only in permanent reduction of future premiums.

26 This Policy, upon written request made while the insurance is in force, may be changed without medical re-examination to any form of participating policy then in use by the company subject to the following conditions:

1. The new insurance shall not exceed the amount of this Policy and this policy must be duly surrendered.

2. *a.* The new policy will be issued as of the date of this Policy, and the premium shall conform to the Company's present published rate for the present age of the Insured, and the difference in premiums will be adjusted with interest at not to exceed the rate of six per cent. per annum; if the change is made later than two years from the date hereof, a tontine dividend period cannot be selected. Or, at the option of the Insured,

b. The new policy will bear the date of the change, with premium conforming to the rates then in use by the Company for the then age of the Insured.

This Policy shall not take effect until the first premium shall have been actually paid while the Insured is in good health, and is issued and accepted by the parties in interest subject to the provisions and benefits stated on the second page hereof which are hereby made a part of this contract.

In witness whereof, The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this fifteenth day of March, one thousand nine hundred and four.

H. L. PALMER, *President.*

J. W. SKINNER, *Secretary.*

R. 8. Renewable Term.

(Note on Margin.)

The first payment on this policy, the receipt whereof is hereby acknowledged, is \$142.50 for 6 months, in order to make renewal fall due Sept. 15th instead of M'ch 15th.

27

Provisions.

1st. No premium after the first shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary and countersigned by an Agent authorized to receive such premium. If default shall be made in the payment of any premium, this Policy shall cease and determine, and, unless restored, all payments thereon shall remain the property of the Company.

2nd. If this Policy be assigned, a duplicate of the assignment shall within thirty days, be given to the Company and satisfactory proof of assignee's interest be produced on making claim. The Company by receiving or filing any assignment will not assume any responsibility for the validity thereof.

3d. After two years from the date hereof, the liability of the Company under this contract shall not be disputed on account of any misstatement in the application, unless it relates to some fact material to the risk and shall have been intentionally made. Misstatements of age, made without fraudulent intent, will be adjusted by the Company in accordance with the published premium rate now in use for the correct age.

Benefits and Privileges.

1st. The mode of premium payment may be changed on any anniversary date from Annual to Semi-Annual or Quarterly, or vice versa, at the premium rates in use by the Company at the date hereof, but the payment of any premium shall not have the effect to continue this Policy in full force longer than for the time specified in the receipt therefor.

2nd. A grace of thirty days, during which the Policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at a rate not to exceed six per cent. per annum.

3rd. If default be made in premium payment, this Policy, if not previously surrendered, may be restored to full force at any time within five years upon certificate of good health being furnished by the Insured and approved by the Company, and payment of all premiums past due, with not to exceed six per cent. yearly interest.

4th. The Insured, subject to the rights of any assignee, may nominate a Beneficiary, or Beneficiaries, provided none be herein named, or may change the Beneficiary or Beneficiaries, at any time during the continuance of this Policy, by filing with the Company a written request accompanied by this Policy, such nomination or change to take effect upon the endorsement of the same on the Policy of the Company.

R. 8.

28

(Endorsement on Policy.)

The Northwestern Mutual Life Insurance Company of Milwaukee
Wisconsin.

No. 576,576.

Amount, \$15,000.00.

Life of J. S. McCue.

Premiums Payable as Follows:

\$285.00 Cash Payable A. on the 15th Day of Sept.

Read this Statement with Care:

Agents are not authorized to waive forfeitures, or to make, alter, or discharge contracts. No Agent has authority, in any case, to waive or postpone payment of premium. No Agent is authorized to collect any premium on account of this policy after the first, unless he presents A Receipt in Printed Form, signed by the President or Secretary of the Company.

If you change your place of residence and Post Office address, please notify the Company immediately.

T. ARCHIBALD CARY,

General Agent.

August 1, 1900.

R. S. Renewable Term.

1201 Main Street, Richmond, Va.

EXHIBIT "No. 2" FILED WITH PETITION FOR REMOVAL OF CAUSE.

Application for Insurance.

Policy Form.

Part I.

No. 576576.
576577.

Application to the Northwestern Mutual Life Insurance Company
of Milwaukee, Wis.

1356.

Part I of Application of James Samuel McCue for Life Insurance.

Name in Full.

1. Residence
County of
State of
P. O. Address

Charlottesville
Albermarle
Va.
Charlottesville, Va.

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2. Full name of the person for whose benefit the insurance is desired? My estate.
Relationship to yourself? Estate.
3. Occupation or employment. Mayor of City.
(If more than one, state all.) Day, Month, Year.
4. Place and date of your birth? Albermarle Co., Va., 15 Jan'y, 1861.
5. Have you ever applied for insurance in this Company? If so, what is the number and amount of each policy issued? No.
6. Is your life now insured in any other Company? If so, in what companies and for what amount? Only Equitable, 10,000; Va. Life Ins. Co., 5,000; Fidelity Mutual, 10,000; New York Life, 10,000; Royal Arcanum, 3,000; Tribe Ben Hur, 3,000; Travellers, 20,000.
7. Have you ever applied to any company or society for insurance, without receiving a policy of the exact kind and amount applied for? No.
8. Is any negotiation for other insurance now pending or contemplated? No.
9. Policy—Amount? \$15,000.00.
Kind? 10 year renewable Term.
How Payable—Ann u a l l y, Please issue policy with part
Semi-Annually or Quar- premium, to be annual from
terly? 15 Sept.
10.
11. Have you paid the Agent No.
taking this application the premium on the same?

I do hereby declare and agree that all the statements and answers contained in this application marked Part 1, and in the supplement hereto marked Part 2, are hereby warranted to be true, and such statements and answers and all agreements herein contained are offered to said The Northwestern Mutual Life Insurance Company as a consideration for the policy applied for and to be construed therewith as parts thereof; and that no other statements, representations or information made or given by or to the person soliciting or taking this application for insurance, or by or to any other person, shall be binding on the said company unless the same be reduced to writing and made a part of this application.

And I do further agree that if the amount of the premium on the insurance herein applied for is not paid when this application is made, no contract of insurance shall be deemed made, and no liability on the part of said company *shall be deemed made, and no liability on the part of said com-* shall arise until a policy shall be issued and delivered to me, nor until the first premium thereon shall be actually paid while I am in good health; but that if the amount of said premium is paid at the time of making this application, the receipt for advance payment of premium given me, if on the form now attached hereto, shall determine the conditions upon which and the time when the insurance applied for shall take effect.

And I do further agree that if within two years from the date of said policy I shall pass south of the tropic of Cancer, or be personally engaged in blasting, mining or sub-marine operations, or in the production of highly inflammable or explosive substances, or in electrical employment where the voltage used is over 600, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping car conductor, mail agent, express messenger or baggage-master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace), without the written consent of said company, or shall within one year from the date of said policy, whether sane or insane, die by my own hand, then and in every such case any policy issued on this application shall be null and void.

Per

JAMES SAMUEL McCUE.

Name in full of
the Beneficiary
(may be signed
by applicant.)

Initials of
Applicant.

Signature in full of
the person apply-
ing for insurance
on his life.

31 Dated at Charlottesville, Va., this 25 day of Feb'y, 1904.

Actual date of signature to application.

Agent's Certificate.

Insurable Age	43
Premium	\$285.00
Name of Applicant	J. Samuel McCue
Kind of Policy	10 yr. Ren. Term
Amount of Policy	\$15,000.00
1. How long and how intimately have you known applicant?	10 years, see him daily
2. Are you satisfied, after thorough personal investigation, that he is and has been of temperate habits?	Yes
3. What amount of other insurance is contemplated?	None

4. About what is his annual income? Don't know—man of means

NOTE.—If you have no knowledge so state.

5. By whom was this insurance suggested? Ourselves

6. I hereby certify that I personally solicited and secured the application of the above named applicant and know he is the person described in Parts I., II. and III. of this application. I know of nothing affecting the risk which is not fully set forth in these papers, and I do unqualifiedly recommend the acceptance of the risk by the Company.

E. L. CARROLL, *Soliciting Agent.*

LITTLETON FITZGERALD,

T. A. CARY, *General Agent.* O. K.

32 *Part II.—Declarations Made to the Medical Examiner of the Northwestern Mutual Life Insurance Co.*

N. B.—Answers to the following questions must be elicited and recorded by a regularly appointed Examiner of the Company, with no one present but the Applicant and Examiner.

1. A. Part II of Application of J. Sam'l McCue for Life Insurance which forms part of the accompanying application signed by the undersigned applicant and marked Part I. Said application is to be hereto annexed.

1356.

- B. Race (white or black?) White.
C. Age last birthday? 43 yrs.
D. Are you married, single or a widower? Married.

2. A. Where do you reside winter and summer? A. Charlottesville, Va.
B. Where have you resided during the past ten years? B. Charlottesville, Va.
C. Have you ever changed your residence or tried a change of climate on account of your health, or been advised to do so by a physician? If so, give particulars. C. No.
D. Do you contemplate, for any reason, either a temporary or permanent change of residence, or a trip beyond the limits of the temperate zone? If so, give particulars? D. No.

3. A. How much insurance are you applying for in this application? A. \$15,000.

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- B. Has any proposal or application to insure your life ever been made to any Company, Society, Association or Agent upon which a policy has not been issued as applied for? B. No.

- C. Has any physician ever given an opinion that you were not safely insurable? C. No.

- D. When and for what Company were you last examined for life insurance? D. 1903, Feb., Life Ins. Co. of Va., Richmond, Va.

4. A. What is your present occupation and how long have you been so engaged? A. Lawyer & Mayor of Ch'ville, 20 yrs. in former.

- B. Have you any other occupation or business? B. No.

- C. What have been your occupations during the past ten years? C. Lawyer & Mayor.

- D. Do you contemplate a change in occupation? If so, what? D. No.

- E. Are you now, or have you ever been engaged, either directly or indirectly, in the sale or manufacture of malt or other spirituous beverages? E. No.

5. A. To what extent, if any, has your weight increased or diminished during the past year, and from what cause? 5 lbs. increase) probably—no reason known.

- B. If heavy or light in weight state whether this is a family or individual characteristic? B. Medium weight.

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- C. Which parent do you most resemble physically? C. Mother.

6. A. If you use wine, spirits, malt liquors or other alcoholic beverages, state kind used and how much in any one day at the most. See Note I. A. None used—possibly one or two drinks monthly.
- B. How frequently do you use the amount stated? B. See above.
- C. If you use of them daily weekly or monthly, state kind and average for the past two years? C. Whiskey 4 teaspoonfuls once a month.
- D. Have you used any of them to the extent of intoxication during the past ten years? D. No—never intoxicated.
- E. Have you ever taken treatment for alcoholic or drug habit? E. No.
- F. If a total abstainer, how long have you been so? F. See above.
- G. In what form and to what extent do you use tobacco? G. None, now.
- H. Do you now use or have you ever used opium, chloral, cocaine or any other narcotic drug? H. No.

35 & 36

7. See Note II.	Age if living.	State of health.	Age if dead.	Specific cause of death.	Duration and character of fatal illness.	Previous health.
Father.....	.....	.....	57	Grippe.....	Several weeks—grippe.....	Good.
Mother.....	.....	.....	54	"Cold" and "Grief".....	Had been complaining for a long time, but finally died suddenly.	Good.
Brothers— No. living.... 7 No. dead..... 2	40 38 37 35 33 31 22	Good. " " " " "	.....	2 died in infancy—in- testinal trouble.		
Sisters— No. living.... 1 No. dead..... 0	45	Good.				
Father's Father.....	.....	.....	60			
Father's Mother.....	.....	.....	72	Burned to death.....		Good—excellent.
Mother's Father.....	.....	.....	70	Indigestion—acute.....	1 week vomiting—from eating oysters.....	"
Mother's Mother.....	.....	.....	55	Not known.....		Good.

8. Have either of your parents, or any of your uncles, aunts, brothers or sisters been afflicted with Consumption?—or Scrofula, Cancer, Insanity, Epilepsy, Gout, Diabetes or Rheumatism? No.

9. Are you brought in close contact with a consumptive? See Note III. No.

10. A. When were you last confined to the house by illness? What was its nature? A. Dec., 1903—thrown from horse—bruised, &c.

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- B. When did you last consult a physician, and for what? B. 22 yrs. ago—blow from a stick.
- C. Have you fully recovered, and are you now in good health? C. Yes.
- D. Give name and address of the physician who attended you. D. Dr. M. L. McCue—Greenwood, Va.
- E. Give name and address of your usual medical attendant. E. Has not had any since residence in Ch'ville, 20 yrs.
- F. Are you willing your physician be consulted respecting your health? F. Yes.

11. Give in detail all illnesses, diseases or accidents you have had during past ten years not mentioned above?

Illness, Disease or Accident	Date	Duration	Severity	Results	Name of Medical Attendant
None					

12. Have you had since childhood any of the following diseases or disorders? See question 10—opposite page.

Malarial or other Fevers?	No.
Smallpox or Varioloid?	No.
Apoplexy or Paralysis?	No.
Mental Derangement or any Nervous Disease?	No.
Headaches, severe, protracted or frequent?	No.
Indigestion, Appendicitis or any Disease of Stomach or Bowels?	No.
Persistent or frequent Cough or Hoarseness?	No.
Spitting or raising of blood?	No.
Asthma or shortness of breath?	No.
Pleurisy, Bronchitis, Pneumonia, or any Chest or Lung Disease?	No.

- 38 Vertigo, Dizziness or Unconsciousness? No.
- Fits, Epilepsy, Delirium Tremens or Convulsions of any kind? No.

Impairment of Eyesight or Hearing?	No.
Discharge from Ear or any other Chronic Discharges?	No.
Piles, Fistula or any other Disease of the rectum?	No.
Chronic or Frequent Diarrhœa or Dysentery?	No.
Affection of the Liver or Spleen?	No.
Jaundice or Dropsy?	No.
Hepatic or Renal Colic or Calculus?	No.
Gravel, Bladder or Kidney Disease?	No.
Painful, frequent or difficult Urination?	No.
Sunstroke or Fainting Spells?	No.
Palpitation or any Disease of the Heart?	No.

Enlarged Veins, Cancer, Tumors, or Ulcers, of any kind?	No.
Hydrocele or any disease of the Testicles or Prostate gland?	No.
Neuralgia or Sciatica?	No.
Skin Disease, Gout or Scrofula?	No.
Syphilis, or Stricture?	No.

State how frequently, the date, character and duration of each, and its effect upon your health?

Of the above named diseases or disorders I have had none except none.

13. A. Are you opposed to vaccination? A. No.
 B. If so and you have not had Smallpox or Varioloid, will you accept a policy containing the Smallpox clause? B. —
 See copy in Note IV.
14. A. Are you ruptured? A. No.
 B. If so, do you wear a truss constantly except when in bed? B. —
15. A. Have you ever had inflammatory or Articular Rheumatism? A. No.
 B. If so, state the number of attacks. B. —
 C. The duration of each attack. C. —
 D. In what years, and parts affected. D. —
16. Have you ever applied for a Pension? If so, what was the disability? No.
- 39 17. Have you undergone any Surgical Operation, or ever had disease of bones of joints, spinal curvature, or any bodily malformation? No.
18. Has a physician at any time expressed an opinion that your urine contained either sugar, albumin or casts? No.
19. Have you had since childhood any chronic or constitutional disease or severe injury not fully set forth above? No.

I certify that my answers to the foregoing questions and statements are correctly recorded.

(Signed in presence of Medical Examiner.)

J. SAMUEL McCUE.

Signed by applicant in my presence.

E. M. MAGRUDER,
Medical Examiner.

Special Report of Examiner.

N. B.—This examination must not be made by a relative of the applicant or agent, nor any one pecuniarily interested in the policy.

1. A. State the rate and quality of the pulse. (Count at least one minute. If over 88 or below 60, examine at another time, and report the result of each examination.) A. 65—good—full—steady—normal.
- B. Is the pulse intermittent, irregular, or does it reveal undue strength or weakness of heart's action? B. No.
- C. Is there any evidence of thromboma, aneurysm or varicose veins? C. No.
(In examining chest, always remove outer clothing and starched shirt.)
- D. Are the heart sounds perfectly normal? D. Yes.
(The heart should be examined both in the recumbent and erect positions, with the stethoscope over bared skin.
- E. Is there any indication of hyperthropy of the heart? Do you find the apex beat outside of normal area? E. No.
2. A. Is the chest well formed and is the expansion at the apex of each lung good? A. Yes.
- B. Does auscultation and percussion of the chest reveal any abnormal condition in either lung—any rales, evidence of former pleurisy, emphysema, asthma, or indication of previous disease? B. No.
3. State measurement of chest (bared) on line of nipples: A. 38¼ inches.
A. Full inspiration B. 34 inches.
B. Expiration.
4. Have you carefully examined the abdomen, and do you find the abdominal organs of normal size, free from tenderness and in a healthy condition? Yes.

5. A. Has he a hernia? If so, state kind. A. No.
 B. Have you examined it, and do you find that a suitable truss is worn? B. —
6. A. Do you find a scar of successful vaccination? A. Yes—2.
 B. State location. B. Left arm.
7. A. Was the urine examined voided by the applicant in your presence? A. Specific gravity, 1020; Albumin, none; Test employed, Heller's Ring Test; Reaction, acid; Sugar, none; Test employed, Fehling's.
- 41
- B. Does applicant rise at night to urinate? B. No. About 5 or 6 A. M. E. M. M.
8. A. Actual weight in ordinary clothing, without overcoat. (If weight approximates maximum or minimum, the examiner must weigh the applicant.) A. 160 lbs.
 Did you weigh him? No.
- B. Height in shoes. (Each applicant must be measured at time of examination.) B. 5 ft. 7 $\frac{3}{8}$ in.
 Did you measure him? No.
- C. Girth at umbilicus, without contraction of abdomen. (Be particular to record normal measurement.) C. 35 in.
9. Any suspicion, past or present, of enlarged prostate, stricture, gonorrhœa or syphilis? No.
 (If applicant objects for confidential reasons having this application pass through the hands of the agent, mail with your voucher direct to the Medical Department.)
10. Did you read each question in 12, Part II, and elicit explicit answers from applicant to each, and are you satisfied their meaning was fully understood by him? Yes.

11. Judging from his appearance and statements and your knowledge of his health record, are you satisfied he uniformly enjoys good health? Yes—I know it.
12. Does he appear older than the age stated? No.
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13. Any need of statement from applicant's medical adviser? (If so, and you find it impracticable for you to secure same, require applicant or agent to do so.) A telephonic communication recorded by Examiner under "Additional Remarks" would be acceptable. No—none.
14. Are you in any way related to the applicant or agent? No.
15. Have you any personal knowledge of the habits, past and present, and the general standing of the applicant? Yes—I know him well—fine risk.
16. Have you any reason to suspect unacknowledged over-indulgence in the use of stimulants, or the use of narcotics, now or in the past? No.
17. How long have you known the applicant and how intimately? Many years—pretty well.
18. Where was this examination made? At applicant's place of business, residence, or examiner's office? When examining applicant, insist on noiseless surroundings. My office.
19. At the time you elicited and recorded the foregoing declarations and during the examination, was there any one present other than the applicant and yourself? No.
20. Can you discover anything unfavorable in his manner of living, physical condition, personal or family history, not already mentioned? No.
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21. Are you satisfied applicant would seek medical advice in case of illness? Yes.

22. Do you unqualifiedly recommend the acceptance of this risk for a life policy (Answer "I do" or "I do not.") See Note VII. See Voucher below. I do—good risk.

I certify that the above is a record of a careful examination of the person described in and whose signature is affixed to the foregoing declarations, and that the examination was made this 27 day of Febr., 1904.

E. M. MAGRUDER, M. D.
(Medical Examiner.)

Examined at Charlottesville, Albemarle, Va.

(Town) (County) (State)

Charlottesville, Va.
(P. O. Address of Medical Examiner.)

These Instructions are Imperative, and must not be deviated from in any manner.

NOTE I.—The answer to question 6 must be definite and convey a clear as to the past and present habits of the applicant in the use of stimulants. Such answers as 'moderately,' 'temperately,' or 'not to excess,' and the like, will not be accepted.

If there is a history of over-indulgence or a free use of stimulants, a full explanation will be required over the signature of the applicant.

NOTE II.—In giving the cause of death, elicit the specific disease: such terms as "exposure," "effects of cold," "general debility," "child-birth," "change of life," "liver complaint," "fever," "intemperance," etc., will not be accepted by the company without an explanation.

In all cases of uncertain cause of death, the report should, if possible, state explicitly that phthisis was or was not an element of the fatal illness.

44 NOTE III.—If a member of applicant's family has tuberculosis, or he is associated closely at his place of business with persons suffering from tuberculosis, see that the application contains full particulars as to relationship and as to precautions to prevent infection.

NOTE IV.—Smallpox Clause. "The insured under this policy having stated he is opposed to vaccination, and that he has not had smallpox or varioloid, it is hereby stipulated and agreed that should his death be caused by, or in consequence of smallpox or varioloid, the company will be liable only for the reserve then held for the policy; Provided, however, that if the Company shall receive at its home office during the life time of the insured, evidence satisfactory to the Company that the insured has been successfully vaccinated, or has had smallpox or varioloid, and has fully recovered, it

will thereupon assume the full risk of death from smallpox or varioloid; it being, however, further stipulated and agreed that in any case all other conditions of the policy, and of the application therefor, shall have been complied with by the said insured.

NOTE V.—The Examiner should exercise great care in the exploration of the thorax. In all cases insist upon the chest being bared, or at least covered only by the undergarment.

The examiner should be thorough in his examination, no matter how well he may know the applicant, or how vigorous he may appear.

NOTE VI.—The urine must invariable be voided in the presence of the Medical Examiner to enable him to know positively that the specimen examined is that of the applicant, and he must refuse to examine a specimen received in any other way. This is not only a protection to the honest applicant and policyholder, but also to the Examiner.

The Examiner should test for sugar and albumin in every sample he examines, no matter what the specific gravity may be. If in previous examinations either has been found, if only a trace, this fact should appear on the application. Examine the urine in every case. Heller's test for albumin, and Haines' or Fehling's test for sugar preferable. See instructions 18 and 19, page 9, of "Instructions to Medical Examiners."

NOTE VII.—To be eligible for a Life Policy, the applicant should possess good health, a good constitution and a good prospect for attaining old age. If not eligible for Life Policy, and his
45 chances are good for living a term of years, he may be insurable under an Endowment Policy which would terminate within the period of his prospective deterioration. (A Life Policy where the premiums are paid within a fixed number of years, should not be confounded with an endowment Policy.)

NOTE VIII.—The answers in the declarations made to the Medical Examiner should be free from alteration, interlineation and erasure, or when unavoidable, the same must be attested by the applicant's initials. No one except the applicant has the legal right to change any of the answers over his signature. Likewise, corrected or changed answers in the examination must be attested by the Examiner.

NOTE IX. Whenever you postpone or do not recommend a risk or should you give an adverse opinion on a risk, or decline to examine the applicant because of the foreknowledge of his ineligibility, you are required to communicate the fact at once to the Medical Department at the Home office.

NOTE X.—If for any reason you should prefer not to state in the application certain facts disclosed by the examination, you should at once write a letter to the Medical Department, giving such facts in detail. Nothing affecting a risk should ever be withheld from the Home Office. Correspondence with respect to an applicant, if so desired, is always considered confidential.

To be filled at Home Office.
Rec'd Mar. 9, 1904, P. M.

Approved.

L. Book XII.

G. A. H. Mar. 17, 1904, P. M. J. W. F., M. D.

Reconsidered and approved.

Rejected.

— — —, M. D.

— — —, M. D.

46 EXHIBIT "No. 3" FILED WITH PETITION FOR REMOVAL OF CAUSE.

Filed November 28, 1905.

Proof of Death of James S. McCue, and Claim.

Notice and Proof of Claim.

Northwestern Mutual Life Insurance Co.

"A."

Claimant's Statement.

In Proof of the Death of James S. McCue.

Policy No. 576576. Date of Policy March 15, 1904.

Am't Claimed, \$15,000.00.

(In cases where the following Forms do not apply, or fail to give such information as shall be satisfactory, the Company reserves the right to require such other information as will enable it to judge of the identity of the person, the justness of the claim, etc.)

If the policy bears date previous to June 1, 1877, furnish a copy of the written portion of the Policy, and state the number of the form upon which it is written (this can be found under the Revenue Stamp).

The Claimant's Certificate is to be executed by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor or administrator of a deceased beneficiary, or as guardian, or other legal representative of a minor, or as a trustee, or as assignee. In case of assignment, interest must be proved, and a copy of the assignment furnished. Executors, administrators and guardian must send certified copies of their appointment and certificate of qualification. Trustees must exhibit their authority.

Every Question Must be Distinctly and Fully Answered.

- 1.—a. Name of Claimants in full. a. Wm. H. McCue, Chas. M. McCue, Leslie H. McCue and E. O. McCue, executors of estate of J. Samuel McCue.
(Write names legibly.)

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- b.* Age of Claimants. *b.* —
- c.* Residence of Claimants. *c.* All Afton, Va., except E. O. McCue, Charlottesville, Va.
(P. O. Address.)
(If any of the Claimants are minors, certified copies of letters of guardianship must be furnished with the proofs of death.)
- 2.—Name of deceased in full. James Samuel McCue,
Residence. Charlottesville, Va.
- 3.—Occupation at date of Insurance. Lawyer.
- 4.—Several occupations since the Insurance was effected. Same.
- 5.—Place of Birth. Near Afton, Albemarle Co.,
Va.
Date of Birth. January 15th, 1861.
State source from which date of birth was obtained. Personal knowledge & from members of family.
- 6.—Place of Death. Charlottesville, Va.
Date of Death. February 10th, 1905.
- 7.—*a.* How long have you been acquainted with the deceased? *a.* All our lives.
- b.* In case of widow, state how long you have been married to the deceased. *b.* —
- 8.—*a.* Remote cause of death. *a.* }
b. When did health of deceased first begin to be affected? *b.* }
c. Immediate cause of death. *c.* } Death caused by hanging.
d. Duration of last illness. *d.* }
e. Give every particular in relation thereto within your knowledge. *e.* }
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- 9.—Name and residence of every physician who attended or prescribed for deceased during the last year prior to death, or since health began to fail. H. T. Nelson, Charlottesville, Va.

- 10.—Residences of the said deceased since the above policy was issued. When, and for what period, at each place? Has he at any time visited any portion of the country beyond the limits prescribed in the policy, or made any voyage to sea? If so, when and where? State these particulars fully. Resided continuously at Charlottesville, Va.
- 11.—Has the deceased at any time been engaged in any military or naval service? No.
- 12.—*a.* Is the said policy in your possession? Yes.
b. Examine the same and state whether, to your knowledge or belief, the insured has complied with all the conditions contained therein. *b.* He has.
- 13.—*a.* Has the policy ever been assigned? If so, to whom and when? *a.* No.
b. Are there any endorsements on the policy, made since it was issued? If so, furnish a sworn copy thereof. *b.* —
- 14.—Was a Coroner's inquest held? If so, furnish the Company with a certified copy of the Jury's verdict, and of all the evidence on which such verdict was based. No.
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- 15.—*a.* In what capacity, or by what title, do you make the claim? *a.* As executors of estate of deceased.
b. Are you legally entitled to receive the entire amount, payable on the Policy? *b.* We are—having qualified as executors & given bond required by law.

16.—Was the deceased, at the time of his death, insured in any other Companies? If so, in what Companies, and for what amount in each Company?

New York Life Ins. Co., \$10,000; Fidelity Mutual of Phila., \$15,000; Equitable Assurance Society Annuity bond, \$10,000; Travellers Ins. Co., \$12,000; Royal Arcanum, \$3,000; Ben Hur, \$3,000.

17.—Are there any proceedings in bankruptcy now pending against the insured?

No.

Having been duly sworn, we hereby depose and say that the answers to the above questions are true, and full, to the best of our knowledge and belief.

Witness our hand this 20th day of February, 1905.

(Signed)

WM. H. McCUE,
C. M. McCUE,
L. H. McCUE,
E. O. McCUE,

Executors.

STATE OF VIRGINIA,

County of Albemarle, ss:

On this 20th day of February, 1905, personally appeared before me the above named Wm. H. McCue, Chas. M. McCue, Leslie H. McCue & E. O. McCue, to me known, who subscribed the foregoing statement in my presence and made oath that the answers to the questions therein made by them are true and full, to the best of their knowledge, recollection and belief.

(Sgd.)

G. F. COMPTON,
Notary Public.

No tax.

50 Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the clerk of a court of record.

STATE OF VIRGINIA,

County of Albemarle, To wit:

I, W. L. Maupin, Clerk of the Circuit Court for said County, the same being a Court of Record, do certify that the above named G. F. Compton is a Notary Public and an officer duly authorized to administer oaths, and that his signature is genuine.

W. L. MAUPIN, *Clerk.*

Feb. 20, '05.

B.

Attending Physician's Statement.

The Attending Physician's Certificate is to be executed by the physician attending the deceased in his or her last illness. If more than one physician were employed, the certificate of each must be obtained. The entire certificate must be in the handwriting of the physician.

In Proof of Death of James Samuel McCue.

- 1.—How long have you practiced as a physician, and where did you receive your medical education? 27 years—Univ. of Va. Med. Dept.
 - 2.—Name of deceased. J. Samuel McCue.
Residence. Charlottesville, Va.
Occupation. Lawyer.
 - 3.—How long have you been acquainted with the deceased? Fifteen years at least.
 - 4.—Were you the attending physician of deceased before last sickness? If so, when, how long, and for what disease did you prescribe, or were consulted? Give full and definite answers. Only once, casually; good many years ago. Don't remember.
- 51
- 5.—Were you the attending physician of deceased during — last sickness, and up to the time of death? Yes.
 - 6.—Date of your first prescription? No prescription was given.
 - 7.—Date of your last visit? Only once did I see him—Feb. 10th, 1905.
 - 8.—*a.* Date of death. *a.* Feb. 10th, 1905.
b. Duration of last illness. *b.* 18 minutes.

- 9.—*a.* State the remote cause of death; if from disease, give the predisposing causes, date of the first appearance of its symptoms, its history, and the symptoms present during its progress? *a.* Death not from disease. Caused by hanging.
- b.* State the immediate cause of death? *b.* Suffocation.
- c.* If from any other cause than disease, state the medical and other facts connected therewith? *c.* No other cause.
- d.* Was a Post-Mortem examination made; by whom, and with what results? *d.* No.
- e.* Had deceased any other disease, acute or chronic, or had he ever had any injury or infirmity? *e.* No.
- f.* Was there anything in the habits or mode of life or residence of deceased, predisposing him to disease? *f.* No.
- g.* State the apparent age of deceased. *g.* 40 years.

- 10.—State whether in your opinion, the disease or death was superinduced by intemperance of any kind. No.

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- 11.—Did the deceased have any hereditary predisposition to the disease of which he died? If so, please state the particulars. No.

Having been duly sworn, I hereby depose and say that the statements in the foregoing answers are true, and full, to the best of my knowledge and belief; and that there are no *material* facts in the case which are not disclosed.

Dated at Charlottesville, Va., this 21st day of February, 1905.

HUGH T. NELSON, M. D.,
Attending Physician.

P. O. Address Charlottesville, Va.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 21st day of February, 1905, personally appeared before me the above named Dr. Hugh T. Nelson, to me known as a physician in regular standing, who being by me duly sworn, deposed that the answers to the above questions are full and true, to the best of his knowledge, information and belief, and subscribed the same in my presence.

G. F. COMPTON,
Notary Public

No tax.

Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the clerk of a court of record.

STATE OF VIRGINIA,
County of Albemarle, To wit:

I, W. L. Maupin, Clerk of the Circuit Court for said County, the same being a Court of Record, do certify that the above named G. F. Compton is an officer duly authorized to administer oaths, and that his signature to the above certificate is genuine.

W. L. MAUPIN, Clerk.

This Feb. 21, 1905.

C.

Statement of the Undertaker.

The Undertaker's Certificate is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the clergyman who officiated at the interment.

53 In Proof of the Death of James Samuel McCue.

- | | |
|---|-------------------------------|
| 1.—Name of the deceased. | James Samuel McCue. |
| Residence and occupation. | Charlottesville, Va., Lawyer. |
| 2.—Did you see the body of James Samuel McCue, and do you know that it was the body of the person described in the accompanying statement of the Claimant in this case? | — |
| Give a. Height | 5 ft. 8 in. |
| b. Weight | 165. |
| c. Color of hair | Dark brown. |
| d. Color of eyes | Blue. |
| e. Nationality. | American. |

- 3.—Age of Deceased. (44) Forty-four.
- 4.—Place and Date of Death. Charlottesville, Va., Feb. 10th, 1905.
- 5.—Place and Date of Interment. Near Afton, Va., in Albermarle Co., Va.

Having been duly sworn, I hereby depose and make oath that the answers to the foregoing questions are true, to the best of my knowledge and belief.

Dated at Charlottesville, Va., this 20th day of February, 1905.

C. W. ALEXANDER.

STATE OF VIRGINIA,

County of Albemarle, ss:

On this 20th day of February, 1905, personally appeared before me the above named C. W. Alexander, to me known, who, being by me duly sworn, deposed that the answers to the above questions are full and true, to the best of his knowledge, information and belief, and subscribed the same in my presence.

G. F. COMPTON,

Notary Public

D.

Statement of an Acquaintance.

This Certificate is to be executed by some responsible householder intimately acquainted with the deceased, who has seen his or her remains, and is not interested in the claim.

54 In Proof of the Death of James Samuel McCue.

- 1.—How long have you known Jas. Samuel McCue? Practically all his life.
- 2.—Place of Birth. Near Afton, in Albemarle Co., Va.
- 3.—Place and date of Death. Charlottesville, Va., Feb. 10, 1905.
- 4.—Have you seen the remains of the body of the person deceased, and is it, to your knowledge, the same person described in the above named Policy of Insurance? Yes.
- 5.—State all the facts within your knowledge relating to the cause of death. Death caused by hanging.

6.—Name and residence of the attending physician. H. T. Nelson, Charlottesville, Va.

7.—Have the habits of life of the deceased been correct and temperate? Yes.

8.—Is there any circumstance within your knowledge, information and belief, or have any facts come to your knowledge, inconsistent with the statements made by the claimant, physician and undertaker in this case? If so, state them fully. No.

9.—Has the deceased, within your knowledge, violated any of the conditions of said Policy of Insurance? No.

10.—Have you any interest in the above Policy? No.

55 Having been duly sworn, I hereby depose and say that the answers to the above questions are true, and full, to the best of my knowledge and belief.

Dated at Charlottesville, Va., this 21st day of Feby., 1905.

WALTRE DINWIDDIE.

P. O. Address, Charlottesville, Va.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 21st day of February, 1905, personally appeared before me the above named Walter Dinwiddie, to me known, who, being by me duly sworn, deposed that the answers to the above questions are full and true, to the best of his knowledge, information and belief, and subscribed the same in my presence.

No tax. My commission expires Aug. 21, 1906.

G. F. COMPTON,
Notary Public.

Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the clerk of a court of record.

STATE OF VIRGINIA,
County of Albemarle, To wit:

I, W. L. Maupin, Clerk of the Circuit Court for said County, the same being a court of record, do certify that the above named G. F. Compton is an officer duly authorized to administer oaths, and that his signature to the above certificate is genuine.

Feb. 21, '05.

W. L. MAUPIN, *Clerk.*

56 *Demurrer of Northwestern Mutual Life Insurance Company to Bill.*

Filed January 1, 1906.

In the Circuit Court of the United States for the Western District of Virginia.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and Ruby G. McCue, Infants Under the Age of Twenty-one Years, Who Sue by Marshall Dinwiddie, Their Next Friend, Complainants,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et als., Defendants.

The Demurrer of the Northwestern Mutual Life Insurance Company, One of the Above Named Defendants, to Certain Parts of the Bill of Complaint of the Above Named Plaintiffs.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' bill to be true, in such manner and form as the same are therein set forth and alleged, demurs to the following parts of said bill, viz.:

1st. That part of said bill which makes J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, parties plaintiff to the same; and William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, parties defendant to the same.

2nd. That part of said bill which seeks to recover of this defendant the sum of fifteen thousand dollars under its policy No. 576,576, on the life of James S. McCue, deceased.

And for causes of this demurrer says:

I. Because improper parties have been joined in said bill, and those who are parties have been improperly made defendants, as follows, viz.:

That at the time of the commencement of this suit, this demurrant was and still is, as alleged in the bill, a foreign corporation, created, organized and existing under the laws of the State of Wis-

consin, and was then, and still is, a resident and citizen of the State of Wisconsin, and was not then, and is not now, a citizen or resident of the State of Virginia; that, as demurrant is informed and believes, J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, alleged to be infants under the age of twenty-one years, and Marshall Dinwiddie, by whom they sue as their next friend, the alleged plaintiffs in this suit, were, at the time of the bringing of the same, and still are, citizens and residents of the State of Virginia; that, as demurrant is informed and believes, William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, who are named as defendants in the said bill, were, at the time of the filing of the same, and still are, citizens and residents of the State of Virginia, and were the only real plaintiffs in the cause, and are in no sense defendants.

The said bill shows that its real and only purpose is to compel the payment by this demurrant of the sum of fifteen thousand dollars, being the amount of a policy of life insurance, to-wit: No. 576,576, issued by it upon the life of the said James S. McCue, and the only persons authorized to sue upon the said policy are the said executors of the said James S. McCue, and therefore they are the only proper plaintiffs in the said bill; that The Peoples National Bank of Charlottesville, which is made a party defendant, has no interest whatever in this controversy or in the said policy of insurance, but is, as alleged in the bill of complaint, only a garnishee; and that the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infant children of the said James S. McCue, have no direct interest in this controversy, but are interested, if at all, only as legatees or beneficiaries under the will of the said James S. McCue, deceased, after the administration of his estate by his said executors.

The said bill further shows that the controversy in this suit is wholly between citizens of different states, to-wit: between the executors of James S. McCue, deceased, who are citizens of the State of Virginia, as aforesaid, and this demurrant, which is a citizen and resident of the State of Wisconsin, as aforesaid, and that such controversy can and should be fully determined as between them, without the presence of the said infant plaintiffs, or the presence of the said The Peoples National Bank of Charlottesville as parties to this cause.

This demurrant further avers that there is no real controversy in this suit between the said executors on the one side and the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G.

McCue, and the said Marshall Dinwiddie, their next friend, but the interests of the said executors and the last named parties are identical and directly opposed to the interests of this demurrant.

This demurrant further avers, upon information and belief, that the said The Peoples National Bank of Charlottesville and the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants, and the said Marshall Dinwiddie, their next

friend, were made parties to the said bill for the express purpose of thereby preventing, if possible, the removal of this cause from the Corporation Court of the City of Charlottesville, wherein the said bill was originally filed, to this court, and the arrangement of the said parties as plaintiffs and defendants in the said bill was made with the same object and intention.

This demurrant, therefore, demurring and protesting, insists that the parties to this suit shall be arranged by this court properly and as their interests in and the nature of the controversy require, in order that justice and equity may be administered between them, viz.: that the said executors of the said James S. McCue shall be the plaintiffs, and this respondent the defendant, with The Peoples National Bank of Charlottesville a formal party, as garnishee or holder of any funds in its hands belonging to this respondent.

II. Because it appears from the said bill that on the 10th day of February, 1905, the said James S. McCue, whose life was insured by this demurrant by its policy No. 576,576, died by being executed, that is to say, that he was hung under and pursuant to the sentence and judgment of a court of competent jurisdiction on the day named, for a capital offense, viz.: for the offense of murder, and therefore that the said James S. McCue died, not from natural causes, nor any of the causes contemplated by the said policy, but from being hung for a crime under the mandate of a court of competent jurisdiction, to-wit: the Corporation Court of the City of Charlottesville, Virginia.

Wherefore, and for divers other good causes of demurrer apparent in said bill, this defendant demurs thereto, and prays judgment of this Honorable Court whether it shall be compelled to make any answer to the said bill, and further prays to be hence dismissed with its reasonable costs in this behalf sustained.

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

By H. L. PALMER, *President*.

[Seal of Northwestern Mutual Life Insurance Co.]

WHITE, TUNSTALL & WILLCOX,

Solicitors for Defendant.

59 STATE OF WISCONSIN,
County of Milwaukee, ss:

H. L. Palmer makes solemn oath and says that he is the president of the Northwestern Mutual Life Insurance Company, the defendant, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact, except as to matter therein stated on information and belief, and as to those matters he believes it to be true.

H. L. PALMER.

Subscribed and sworn to before me this sixth day of December, 1905.

[SEAL OF NOTARY PUBLIC.]

W. J. HOLBROOK,

Notary Public, Milwaukee Co., Wis.

My notarial commission expires on the 4th day of March, in the year 1906.

STATE OF WISCONSIN,
County of Milwaukee, ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT.

I, A. A. Wieber, Clerk of the Circuit Court of the County of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that W. J. Holbrook, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof a Notary Public within and for said State, residing in said County, duly appointed and qualified and empowered by the laws of said state to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such, full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the state.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said County and State, on
60 the 7th day of December, one thousand nine hundred and five.

[SEAL OF COURT.]

A. A. WIEBER,
Clerk of Circuit Court.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

WM. H. WHITE,
Counsel for the Defendant.

Answer of Northwestern Mutual Life Insurance Company to Bill.

Filed January 1, 1906.

In the Circuit Court of the United States for the Western District
of Virginia.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby G. McCue, Infants under the Age of Twenty-one Years,
Who Sue by Marshall Dinwiddie, Their Next Friend, Complain-
ants,

VS.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al.,
Defendants.

To the Honorable Judges of the said Court:

Without waiving its demurrer heretofore filed, but, on the contrary, insisting on the same, The Northwestern Mutual Life Insurance Company, a corporation duly created, organized and existing under the laws of the State of Wisconsin, and a citizen and resident of the said State, respectfully files this its answer to a bill exhibited against it and others in the Corporation Court of the City of Charlottesville, Virginia, by J. William McCue and others, and which was removed by an order of the said last named court to this Honorable Court.

This defendant, now and at all times hereafter saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties and insufficiencies in the said bill contained, for answer thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to answer, answering, says:

61 That it was at the time of the commencement of this suit, and still is, as alleged in the bill, a foreign corporation, created, organized and existing under the laws of the State of Wisconsin, and was then, and still is, a resident and citizen of the State of Wisconsin, and was not then, and is not now, a citizen or resident of the State of Virginia; that as respondent is informed and believes, J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, alleged to be infants under the age of twenty-one years, and Marshall Dinwiddie, by whom they sue as their next friend, the alleged plaintiffs in this suit, were, at the time of the bringing of the same, and still are, citizens and residents of the State of Virginia; that The Peoples National Bank of Charlottesville, Virginia, a corporation created, organized and existing under the laws of the United States, which is named as one of the defendants in the said bill, was at the time of the filing of the same, and is now, located and doing business at Charlottesville, in said State of Virginia, and has no interest whatever in said suit, being only, as alleged in the said bill, a garnishee; that, as respondent is informed and be-

lieves, William H. McCue, Charles M. McCue, Leslie H. McCue, and E. O. McCue, executors of James S. McCue, deceased, who are also named as defendants in the said bill, were at the time of the filing of the same, and still are, citizens and residents of the State of Virginia, and as this respondent is informed and believes, and therefore charges, are the only real plaintiffs in this cause and are in no sense defendants.

The real and only object of this suit is to compel the payment by this respondent of the sum of fifteen thousand dollars (\$15,000.00), being the amount of a policy of life insurance, to-wit: Number 576,576, issued by this respondent upon the life of the said James S. McCue, which said policy is in the possession of the said executors, and the production thereof is hereby demanded by this respondent; meanwhile, a copy of the same has been filed as Exhibit No. 1 with the petition for the removal of this cause, which copy is prayed to be taken as a part of this answer as fully as if filed herewith.

This respondent denies that either the said infant heirs or the said executors of the said James S. McCue are entitled to recover the amount of the said policy, but if any such parties are so entitled, they are the said William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of James S. McCue, deceased, who have filed with this respondent the proofs of the death of the said James S. McCue under said policy and made claim upon it for the amount of said policy as due to them in their said executorial capacity, and under the terms of said policy of insurance a recovery can only be had, if at all, at the instance of the said executors, as will appear from said policy.

The said proofs of the death of the said James S. McCue and the claim and demand made by said executors on this respondent are herewith filed, marked Exhibit No. 1, and are prayed to be taken as part of this answer.

This respondent further avers that the said The Peoples National Bank of Charlottesville has no interest whatever in this controversy or in the said policy of insurance, but is, as alleged in the bill of complaint, only a garnishee, and that the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue have no direct interest in the said policy or in the said controversy, but are interested, if at all, only as legatees or beneficiaries under the will of the said James S. McCue, deceased, after the administration of the said estate by the said executors, and the payment of his debts.

Your respondent further avers that the controversy in this suit is wholly between citizens of different states, to-wit: between the executors of James S. McCue, deceased, who are citizens of the State of Virginia, as aforesaid, and your petitioner, which is a citizen and corporation of the State of Wisconsin, as aforesaid, and that such controversy can and should be fully determined as between them without the presence of the said infant plaintiffs, or the presence of the said The Peoples National Bank of Charlottesville, as parties to this cause.

This respondent further avers, on information and belief, that there is no real controversy in said suit between the said executors

on the one side and the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, and the said Marshall Dinwiddie, their next friend, but the interests of the said executors and the said last named parties are identical and directly opposed to the interests of this respondent.

For further answer, this respondent avers and charges, on information and belief, that the said The Peoples National Bank of Charlottesville and the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants, and the said Marshall Dinwiddie, their next friend, were made parties to the said bill for the express purpose of thereby preventing, if possible, the removal of this cause from the said Corporation Court of the City of Charlottesville to this court, and the arrangement of parties as plaintiffs and defendants in the said bill was made with the same object and intention.

This respondent, therefore, further answering and protesting, insists that the parties to this suit shall be arranged by this
63 court properly and as their interests in, and the nature of, the controversy require, in order that justice and equity may be administered between them, viz.: that the said executors of said James S. McCue shall be the plaintiffs, and this respondent the defendant, with The Peoples National Bank of Charlottesville a formal party as garnishee or holder of any funds in its hands belonging to this respondent.

It is true, as charged in said bill, that this respondent is, and for many years prior to the filing of said bill, had been, a mutual life insurance company, with the rights, and subject to the liabilities of a mutual life insurance company under the laws of the State of Wisconsin. It is further true that on the 15th day of March, 1904, this respondent insured the life of the said James S. McCue for the sum of fifteen thousand dollars (\$15,000.00) by its Policy Number 576,576, the original of which, as hereinbefore stated, is now in the possession of the said executors of the said James S. McCue.

The said policy contains, among other things, the following:

"In consideration of the statements and agreements made in the application for this Policy, which is hereby made a part of this contract, and in further consideration of the payment of two hundred and eighty-five dollars, and of the annual payment of a like sum to the said company, at or before twelve o'clock noon on or before the 15th day of September, in every year during the continuance of this Policy, promises to pay, at its office in Milwaukee, Wisconsin, unto such Beneficiary or Beneficiaries of James S. McCue, the Insured, of Charlottesville, in the State of Virginia, as may hereafter be nominated under this contract, subject to the right of the Insured to change the Beneficiary or Beneficiaries as hereinafter provided, the sum of fifteen thousand dollars, upon receipt and approval of proofs of the fact and cause of the death of said Insured while this Policy is in force, if such death shall occur within the period of ten years from the date hereof, the balance of the year's premium, if any, and any other indebtedness to the Company on account of this Policy being first deducted therefrom; provided, however, that

if no Beneficiary shall survive the said Insured, then such payment shall be made to the executors, administrators or assigns of the said Insured."

That the said policy was issued upon the written application of the said James S. McCue, made and signed by him on the 25th day of February, 1904, which is herewith filed as a part of this answer, marked Exhibit No. 2.

64 It will appear from this application that the said James S. McCue, in response to the following question, viz.: "Full name of the person for whose benefit the insurance is desired?" answered as follows: "My estate."

For further answer, this respondent says, that by the express terms of the said policy, the said application was made a part thereof, and therefore this respondent avers that the beneficiary which the said James S. McCue directed should receive payment under the said policy, was expressly declared to be the representatives of his estate, and not the infants named in the said bill as plaintiffs, and alleged to be his sole heirs.

Still further answering, this respondent says, that after the death of the said James S. McCue, his said executors, hereinbefore named, qualified as such in the proper State Court, and in writing over their own signatures, and upon their oaths before a notary public, namely, one G. F. Compton, made on the 20th day of February, 1905, declared that William H. McCue, Charles M. McCue, Leslie H. McCue and E. O. McCue, executors of the estate of James S. McCue, were the claimants in full to the amount claimed under said policy.

The said executors expressly in the said proof of loss stated, in response to a question in said proof contained, as to what capacity, or by what title they made the claim, that they did so as the "Executors of estate of deceased."

They still further alleged in the said proof of loss that they had qualified as such executors and given the bond; all of which will more fully and at large appear by reference to the said proofs of loss.

This respondent therefore denies all of those parts of the bill which directly or indirectly, expressly or by implication, allege that the infant heirs of the said James S. McCue are the beneficiaries under the said policy, or are entitled to demand and claim the benefits thereof, by virtue of any of the provisions of the said policy, the charter of the respondent, or of any of the laws of the State of Wisconsin.

This respondent expressly denies the construction placed by said bill upon the charter of this respondent, upon the laws of the State of Wisconsin, and upon the said policy of insurance; and also denies everything in the said bill contained inconsistent with the provisions of the said policy herein quoted, and with the said application and proofs of loss herewith filed, and insists that the only question involved, or which can be involved, in this controversy, is, whether the respondent is liable under the terms of the said policy, to pay to the

executors of the said James S. McCue the said fifteen thousand dollars in said policy named, or any part thereof.

65 And this respondent, without making further specific answer to the allegations of the said bill in detail, and without any admission of their truth, but, on the contrary, denying the same, says:

That it has been advised by its legal counsel that it is in no wise liable to pay to the said executors, or any one else, any part of the said fifteen thousand dollars in said policy named, because the said James S. McCue came to his death by hanging, pursuant to the verdict of a jury of his countrymen, for the murder of his wife, and under a judgment of the Corporation Court of the City of Charlottesville, Virginia, pronounced on the ninth day of Novr., 1904, and approved by the Supreme Court of Appeals of the State of Virginia. All of which will appear by reference to copies of said verdict and judgments of said courts herewith filed as parts of this answer.

This respondent, therefore, further answering, says that as a Mutual Company, it is further advised that it is its duty in the discharge of its fiduciary obligations to, and its trusteeship for its policy-holders, to resist the payment of said policy, or any part thereof, until and unless it shall be adjudged to do so by the order and direction of the courts of the country.

It does, however, hereby renew its offer made to Messrs. Walker & Sinclair and D. Harmon, attorneys, and to the executors of the said James S. McCue, to return to said executors all premiums paid it by the said McCue on account of said policy. The same amount to \$427.50, which this respondent here tenders to be paid into the Registry of this court, to be disposed of as it shall adjudge proper.

It therefore asks judgment in the premises, and having fully answered, prays hence to be dismissed with its reasonable costs in this behalf expended. And it will ever pray, etc.

[Seal of Northwestern Mutual Life Insurance Co.]

THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY,
By H. L. PALMER, *Its President*.
WHITE, TUNSTALL & WILLCOX,
Solicitors for Defendant.

STATE OF WISCONSIN,
City of Milwaukee, To-wit:

H. L. Palmer, being sworn, says that he is the president of the Northwestern Mutual Life Insurance Company, and that the
66 facts set forth in the foregoing and annexed answer where made of his own knowledge are true, and where made upon knowledge or information derived from others, he believes them to be true.

H. L. PALMER.

Subscribed and sworn to before me this 6th day of December, 1905.

My commission expires March 4, 1906.

[Seal of Notary Public.]

W. J. HOLBROOK,
Notary Public, Milwaukee County, Wisconsin.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Office of the Clerk of the Circuit Court.

I, A. A. Wieber, Clerk of the Circuit Court of the County of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that W. J. Holbrook, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof, a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said state to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such, full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said County and State, on the 7th day of December, one thousand nine hundred and five.

[Seal of Court.]

A. A. WIEBER,
Clerk of Circuit Court.

67

EXHIBIT "No. 1" FILED WITH ANSWER.

(Proof of death of James S. McCue and Claim of Plaintiff Executors.)

(See copy of Exhibit on page 46 of this Transcript.)

EXHIBIT "No. 2" FILED WITH ANSWER.

(Policy of Insurance of James S. McCue.)

(See copy of Policy on page 25 of this Transcript.)

EXHIBIT "No. 3" FILED WITH ANSWER.

(Copies of Verdict and Judgment of Corporation Court of Charlottesville.)

At a Corporation Court Continued and Held for the City of Charlottesville, Virginia, on Saturday, the 5th Day of Nov., 1904.

COMMONWEALTH OF VIRGINIA

vs.

J. SAMUEL McCUE.

Upon an Indictment for Murder.

This day came the Attorney for the Commonwealth, and the prisoner was again led to the bar in the custody of the jailer of this court, and the jury heretofore sworn to try this case appeared in court in charge of C. W. Rogers, City Sergeant, O. M. Wood and L. W. Wood, Deputy City Sergeants, and after hearing the rest of the argument, the jury retired to their room to consider of their verdict, and after some time returned into court with a verdict as follows, to-wit:

"We the jury, find the defendant guilty as charged in the within indictment for murder in the first degree."

"SHELTON CHIEVES,

"Foreman."

Whereupon the jury being polled, each juryman answered in the affirmative that that was his verdict.

Thereupon the counsel for the defendant asked the court to set aside the verdict on the following grounds:

Because the verdict is contrary to the law and the evidence;

68 Errors of the court during the progress of the trial as to the admissibility of evidence and certain questions and answers objected to by the accused;

Because (as they alleged) the jury were permitted to read the newspapers;

Because the court refused to discharge the jury in view of the statement made by Capt. Woods with respect to his refusing a retainer.

The prisoner; by counsel asked the court leave to argue these motions, and on motion of the accused, by counsel, these motions are continued and set for hearing on Wednesday, November 9th, 1904. Thereupon the prisoner is remanded to jail.

VIRGINIA:

At a Corporation Court Held for the City of Charlottesville on Nov. 9th, 1904.

COMMONWEALTH

vs.

J. SAMUEL McCUE.

Indictment for a Felony.

This day came the attorney for the Commonwealth, and the prisoner was led to the bar in the custody of the jailer of this court.

And the prisoner, by counsel, moved the court to grant him a new trial on the grounds heretofore specified, and the court overruled said motion, and refused to grant a new trial; to which ruling of the court the prisoner, by counsel, excepted, and prayed that the evidence in this cause be certified with his exception, signed and sealed and made a part of this record, which was accordingly done. And then the prisoner, by counsel, moved the court in arrest of judgment for error alleged to be apparent on face of the record, in this, that the verdict of the jury as rendered, was not such as to authorize the court to enter judgment on and to order the execution of the prisoner, which motion the court overruled, to which ruling of the court the prisoner, by counsel, excepted. Then the prisoner, by counsel signified his intention to take an appeal, and asked for time to apply for a writ of error, and the court held that execution of its judgment should be postponed until the 20th day of January, 1905, this date being a reasonable time beyond the first day of the next term of the Supreme Court of Appeals. It was then demanded of the prisoner if anything for himself he had or knew to say why the court here to judgment and execution against him, of and upon the premises, should not now proceed, and the prisoner said 69 nothing in delay thereof. And thereupon it is considered by the court that the said prisoner, J. Samuel McCue, be taken to the County Jail of Albemarle County, which is also used as the City Jail of Charlottesville, and therein confined in solitary confinement until the 20th day of January next; that he be on that day taken from his place of confinement by the Sergeant of the City of Charlottesville, between the hours of sunrise and sunset, to some place within the enclosure of said jail, and by said Sergeant be hanged by his neck until he is dead. And the prisoner, by his attorneys, and with the leave of the court, filed his several bills of exception to various rulings of the court numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45, and prayed that his said several bills of exception might be signed, sealed and enrolled by the court and made a part of this record, which was accordingly done.

And the prisoner was remanded to jail.

A copy of the foregoing order of the Corporation Court of Charlottesville, Virginia, entered on the 9th day of November, 1904, was delivered to C. W. Rogers, Sergeant of the City of Charlottesville, Va., which order, with his return thereon endorsed, are in words and figures following, to-wit:

VIRGINIA:

At a Corporation Court Held for the City of Charlottesville, on
Nov. 9th, 1904:

COMMONWEALTH

VS.

J. SAMUEL McCUE.

Indictment for a Felony.

This day came the attorney for the Commonwealth, and the prisoner was led to the bar in the custody of the jailor of this court. And the prisoner, by counsel, moved the court to grant him a new trial on the grounds heretofore specified, and the court overruled said motion, and refused to grant a new trial; to which ruling of the court the prisoner, by counsel, excepted, and prayed that the evidence in this cause be certified with his exception, signed and sealed and made a part of this record, which was accordingly done. And then the prisoner, by counsel, moved the court in arrest of judgment for error alleged to be apparent on face of the record, in this, that the verdict of the jury as rendered, was not such as to

70 authorize the court to enter judgment on and to order the execution of the prisoner, which motion the court overruled, to which ruling of the court the prisoner, by counsel, excepted. Then the prisoner, by counsel signified his intention to take an appeal, and asked for time to apply for a writ of error, and the court held that execution of its judgment should be postponed until the 20th day of January, 1905, this date being a reasonable time beyond the first day of the next term of the Supreme Court of Appeals. It was then demanded of the prisoner if anything for himself he had or knew to say why the court here to judgment and execution against him, of and upon the premises, should not now proceed, and the prisoner said nothing in delay thereof. And thereupon it is considered by the court that the said prisoner, J. Samuel McCue, be taken to the County Jail of Albemarle County, which is also used as the City Jail of Charlottesville, and therein confined in solitary confinement until the 20th day of January next; that he be on that day taken from his place of confinement by the Sergeant of the City of Charlottesville, between the hours of sunrise and sunset, to some place within the enclosure of said jail, and by said Sergeant be hanged by his neck until he is dead. And the prisoner, by his attorneys, and with the leave of the court, filed his several bills of exception to various rulings of the court numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45, and prayed that his said several bills of exception might be signed, sealed and enrolled by the court and made a part of this record, which was accordingly done.

And the prisoner was remanded to jail.

A Copy—Teste:

R. W. DUKE, Clerk.

By order of his Excellency, A. J. Montague, Governor of Virginia, dated Jan. 18, 1905, and hereto attached, the execution of J. Samuel McCue, is postponed until February the 10th, 1905.

C. W. ROGERS,
Serg't Charlottesville, Va.

Executed (at the place designated in the within writ) February the 10th, 1905, at thirty-four minutes past seven o'clock A. M., by hanging the within named J. Samuel McCue by the neck until he was dead. When the said J. Samuel McCue had hung by his neck for a period of nineteen minutes, the attending surgeon, Dr. Hugh T. Nelson, pronounced him dead. Eight minutes later I ordered the body taken down, which was accordingly done, and turned over to the undertaker for burial.

C. W. ROGERS,
Sergeant of Charlottesville, Va.

COMMONWEALTH OF VIRGINIA:

To all to whom these presents shall come, Greeting:

Whereas, at a Corporation Court held in and for the City of Charlottesville, in the month of November, in the year one thousand nine hundred and four, J. Samuel McCue was convicted of murder in the first degree, and was thereupon sentenced to be hanged on the twentieth day of January, one thousand nine hundred and five, and whereas it appears to the Executive that it is proper that the execution of said sentence be temporarily suspended;

Therefore, I, A. J. Montague, Governor of the Commonwealth of Virginia, have, by virtue of authority vested in me, respited and do hereby respite the execution of the said sentence until the 10th day of February, one thousand nine hundred and five, and do order that on the said last named day the sentence of the said court be duly executed.

Given under my hand and under the Lesser Seal of the Commonwealth, at Richmond, this 18th day of January, in the year of our Lord, one thousand nine hundred and five and in the one hundred and twenty-ninth year of the Commonwealth.

By the Governor:

A. J. MONTAGUE.

J. G. HANKINS,

Acting Secretary of the Commonwealth.

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 12th Day of January, 1905.

Certified to the Clerk of the Corporation Court, City of Charlottesville, Jan. 13, 1905.

The petition of J. Samuel McCue for a writ of error and super-

72 sedeas to a judgment of the Corporation Court of the City of Charlottesville, rendered on the 9th day of November, 1904, whereby it was considered by the said court that the said J. Samuel McCue be hanged by the neck until he be dead, having been maturely considered, and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas.

A Copy—Teste:

H. STEWART JONES, C. C.

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Tuesday, the 17th Day of January, 1905.

J. SAMUEL McCUE, Plaintiff in Error,
against

THE COMMONWEALTH OF VIRGINIA, Defendant in Error.

Upon a Petition to Re-hear.

This day came the plaintiff in error, by counsel, and moved the court to set aside its judgment rendered in this case on the 12th day of January, 1905, and to grant a re-hearing thereof; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy—Teste:

H. STEWART JONES, C. C.

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 26th Day of January, 1905.

J. SAMUEL McCUE, Plaintiff in Error,
against

THE COMMONWEALTH OF VIRGINIA, Defendant in Error.

Upon a Petition to Re-hear.

After mature consideration of the petition of the plaintiff in error to set aside the judgment entered in this case on the 12th day
73 of January, 1905, and to grant a re-hearing of said case, for reasons stated in writing and filed with the record, it is ordered that the prayer of said petition be denied.

A Copy—Teste:

H. STEWART JONES, C. C.

STATE OF VIRGINIA,

City of Charlottesville, To-wit:

I, G. F. Compton, Deputy Clerk of the Corporation Court of the City of Charlottesville, do hereby certify that the foregoing is a true and correct transcript of the orders, returns and copies as they appear from the records in my office, in the matter of the Commonwealth vs. J. Samuel McCue.

In testimony whereof, I have hereunto set my hand and annexed the seal of the said court, this 13th day of December, 1905.

[SEAL OF COURT.]

G. F. COMPTON,

Deputy for R. W. Duke, Clerk C. C. C.

STATE OF VIRGINIA,

City of Charlottesville, To-wit:

I, George W. Morris, Judge of the Corporation Court of the City of Charlottesville, hereby certify that G. F. Compton, Deputy Clerk, whose name is signed to the foregoing certificate, is, and was at the time of signing the same, Deputy Clerk of the said court, duly qualified; that his attestation is in due form of law; that his signature is genuine, and all his official acts entitled to full faith and credit.

Given under my hand this 14th day of December, 1905.

GEO. W. MORRIS, *Judge.*

STATE OF VIRGINIA,

City of Charlottesville, To-wit:

I, G. F. Compton, Deputy Clerk of the Corporation Court of the City of Charlottesville, do hereby certify that George W. Morris, whose name is signed to the foregoing certificate, is, and was at the time of signing same, Judge of the said Court, duly qualified.

Given under my hand this 13th day of December, 1905.

G. F. COMPTON,

*Deputy Clerk for R. W. Duke, Clerk Corporation
Court of Charlottesville, Virginia.*

74

Amendment to Plaintiffs' Bill.

Filed October 8, 1906.

In the Circuit Court of the United States for the Western District of Virginia. In Chancery.

J. WILLIAM McCUE and Others

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and
Others.

In the original bill in the above entitled cause is the following allegation: "On the 15th day of March, 1904, the said James S. Mc-

Cue, at the solicitation of the said company, procured a policy therein for the sum of \$15,000.00 by taking out and paying for the same as *as* required by the charter of the said company, which policy bears date on the said 14th day of March, 1904, and is duly executed in the name and on behalf of the said company by its proper officers; and on the said last mentioned date, the said James S. McCue paid to the said company the sum of \$142.50 premium for six months on said policy of insurance, and the said policy was then delivered to him, and afterwards, to-wit: on the — day of May, 1904, the said James S. McCue paid to the said Northwestern Mutual Life Insurance Co. the further sum of \$285.00, the premium and assessment made on the said policy of insurance for one year from the 15th day of Sept., 1904, to the 15th day of Sept., 1905." Since the filing of the said original bill, complainants have learned that the foregoing is not a correct statement of the circumstances under which the said payments were made, and desire to amend said allegation so as to read as follows: "Your complainants aver that on the 15th day of March, 1904, the said James S. McCue, at the solicitation of said company, procured a policy therein, under the charter provisions of the company, which said policy bears date the 14th day of Sept., 1904, and is duly executed in the name and on behalf of said company by its proper officers, and on said last mentioned date, the said James S. McCue gave to the duly authorized agents of the said company his note for the sum of \$427.50 for the premiums thereon. Said note was payable at six months after its date, and was given with the understanding and agreement that the same was not to be used, but was to be held by the said agents until its maturity, on the 15th day of September, 1904, and to be then forwarded to him for payment; that on the 10th day of September, 1904, he paid a
75 portion of said note, and on the 15th day of September, 1904, he paid the remainder thereof, which premium and assessment made on said policy and paid as aforesaid, paid up the same for eighteen months from the 15th day of March, 1904, to the 15th day of September, 1905."

It is agreed between complainants and the defendant company that the allegation last above shall be treated as an amendment to the original bill, and in lieu of the allegation herein first set forth, but subject to the right of the defendant company to file its answer to said amendment.

Oct. 6, 1906.

G. B. SINCLAIR,
D. HARMON,

Att'ys for J. S. McCue's Heirs.
NORTHWESTERN MUTUAL LIFE
INS. CO.,

By WHITE, TUNSTALL & WILLCOX,
Its Att'ys.

Opinion of the Court.

Filed November 24, 1906.

United States Circuit Court for the Western District of Virginia, at
Lynchburg.

McCUE et al.

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE Co. et al.

Walker & Sinclair and Daniel Harmon, for complainants and
McCue's Exors.; White, Tunstall & Willcox for Insurance Company.

Argued in chambers Nov. 15, 1906.

Decided Nov. 24, 1906.

McDOWELL, *District Judge*:

The Facts.

The facts have been agreed. So far as now material they are as follows:

76 On March 15, 1904, one J. S. McCue insured his life under a policy issued by the defendant company. None of the stipulations of the policy are now of particular interest except that by its terms the company agreed to pay to the executors, administrators or assigns of the insured the sum of fifteen thousand dollars if the insured should die within ten years from the date of the policy. No assignment of the policy was ever made.

The insured was on Feby. 10th, 1905, hanged, under the judgment of the Corporation Court of Charlottesville, Va., for the murder of his wife, committed after the policy was issued. It is agreed that the sentence was just.

Before his death the insured made a valid will in which he left all of his estate of every kind to his children and by which he nominated his brothers as executors. This will was duly probated and the executors duly qualified. In the application for the policy, which is made a part thereof, the insured stated that he desired the policy for the benefit of his estate.

Proper proofs of death having been made by the executors, and their demand for payment having been refused by the company, this proceeding was instituted in the Corporation Court of Charlottesville and was in due time removed to this court by the company. The proceeding was instituted by a bill in equity, with attachment issued against a resident garnishee, under the Virginia statute allowing a legal or equitable cause of action to be thus prosecuted. The complainants, who sue by next friend, are the infant children of the insured—all citizens and residents of this district. The defendants are the insurance company—a mutual incorporated insurance society, created by the laws of Wisconsin,—the garnishee, and the

executors under the will of the insured—citizens and residents of this district. The bill, *inter alia*, alleges that the executors claim the insurance money, but asserts that the right thereto is vested in complainants, or at least that the beneficial right is thus vested.

The insurance company has demurred and answered. Neither the garnishee nor the executors have filed pleadings. The executors are represented by the same counsel as the complainants.

When this cause was called for argument, counsel made a stipulation whereby a jury was waived, if it should be determined that this cause is a legal rather than an equitable cause.

The insurance company has paid into the registry of this court the premium money (the manner of the original payment of which by the insured will be hereinafter stated) to be disposed of as the court shall determine.

77

Opinion.

The first question is whether this court must, in deciding the question of liability of the insurance company, be guided by the principles of "general commercial law" (Carpenter v. Insc. Co., 16 Pet., 495, 511; Washburn Co. v. Insc. Co., 179 U. S., 1, 16. See also *Sias v. Insc. Co.*, 8 Fed., 187, 188); or by some other rule.

In the charter of the insurance company here, which is embodied in an act of the legislature of Wisconsin, is the following clause:

"SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer."

It is argued that in cases where the policy is payable on the death of the insured this clause makes the heirs, executors, administrators or assigns of one who had insured his own life for the benefit of his estate and assigns, members of this (mutual) insurance company. On this construction of this section counsel for the claimants found a contention, rather difficult to express briefly, that the rights of the parties here are to be ascertained as they would be by a Wisconsin court.

The best conclusion I have been able to reach is that, even if this construction of the above quoted charter provision be sound, this court must here be guided by the principles of the general commercial law. But, partly because of this contention and partly because of other deductions made by counsel for claimants founded on their construction of this section of the charter, it seems advisable to here discuss somewhat fully the meaning of this section.

In this discussion I shall consider only the (possible) application of this section to cases where the policy is made payable on the death of the person whose life is insured. It is possible that this section was intended to apply only to cases where the policy is payable at a fixed future date which may not arrive for a considerable time after the death of the person whose life is insured. But it seems unnecessary to consider the meaning of the section as applied to such cases, for in the case at bar the policy is payable on the death

of the person whose life was insured. And if this section — to both classes we are here only concerned as to its application in cases such as we have here.

78 (1) Where A. insures his own life for the benefit of his "heirs," executors, administrators or assigns; and then assigns the policy to Z., (assuming the circumstances to be such as to make this permissible) it may be—A. still living—that Z. becomes a member of the society. But, if so, I incline to the opinion that Z., upon the assignment being made, becomes a member, not as the "assign" of one "who has insured with the corporation;" but because he has become the assured, because he has become, within the meaning of the charter, the person who has "insured with the corporation."

(2) Where A. insures his own life for the benefit of his executors, administrators or assigns, and dies, having made no assignment of the policy to any stranger, the construction put on section 4 by counsel for claimants is that on A.'s death his personal representatives and heirs become members of the society. Parenthetically, it should here be said that, if this be the true construction, it seems to me that it is, in the case at bar, the executors, and not the children, who would become members. But I find myself unable to agree that this is the proper construction. The theory of life insurance, in case the policy is payable as it is here, is that the sum promised to be paid by the insurer will be paid as soon as reasonably may be after the death of the person whose life is insured. Hence I can see no reason why the personal representatives or devisees or distributees of the decedent should become members of the society. Their only interest is to forthwith collect the insurance money. Again, they do not continued to be insured. And under this section it is only the personal representatives or heirs, continuing to be insured, who become members.

(3) The case where this section seems to subserve a useful purpose, if it applies at all, is where A. (having an insurable interest) insures the life of B. for the benefit of A's successors in interest or assigns; and then, having made no assignment, dies, leaving B. living. I find nothing in the charter which forbids one to insure the life of another, where, impliedly, such insurance is not forbidden by statute or the policy of the law; and section 20 of the amendment of Mar. 15, 1870, clearly contemplates such insurance. In such case, A. dying, (B. living) the successors in interest of A. can "continue to be insured," and there is good reason why the charter of this mutual insurance company should provide that A's successors in interest shall become members—with a consequent voice in the management of the company.

79 (4) It is unnecessary to consider the case (assuming it to be a permissible hypothesis) where A. insures the life of B. for the benefit in the first instance of Z. Here in effect it is Z. (A. paying the premiums for Z.) who insures the life of B., and we have in principle the case last above considered.

In the case at bar McCue insured his own life for the benefit of his executors, administrators or assigns. By will he left the benefit of the policy to his children and appointed executors. Under this

state of fact I am led to the conclusion that neither the executors nor the children have become members of the insurance company.

If the construction that I put on section 4 be correct, it seems to me that there can be no shadow of foundation for the contention that this court must construe the contract here according to some supposed doctrine of the Wisconsin courts, rather than according to the doctrine of the general commercial law.

It follows that, if there be a decision, not a mere dictum, of the Supreme Court of the United States, fairly covering the exact question here presented, such decision is in this court absolutely binding. *Burt v. Insc. Co.*, 187 U. S., 362, seems to me to be incontestably such a case. In that case Wm. E. Burt insured his own life under a policy the stipulations of which were in all material respects like those of the one at bar. The policy in case of death was payable to Anna M. Burt, his wife, if living, otherwise to his executors, administrators or assigns. Shortly thereafter the insured and his wife assigned a half interest in the policy to S. M. Burt and H. R. Burt, (105 Fed., 419)—who were creditors of the assignors. Thereafter Wm. E. Burt killed his wife. He thereafter, while under indictment, assigned the remaining half interest in the policy to said S. M. Burt and H. R. Burt. Wm. E. Burt was subsequently convicted of the murder of his wife and was executed therefor. S. M. Burt and H. R. Burt, who were not only the assignees of the policy of insurance as above stated, but were also the sole heirs of Wm. E. Burt, sued at law on the policy. The petition, which set out the above facts, as well as some others to be mentioned, was demurred to. The trial court sustained the demurrer and this judgment was affirmed by the Circuit Court of Appeals (105 Fed., 419), and again by the Supreme Court.

There was in the petition an allegation that, notwithstanding the indictment and conviction, Wm. E. Burt did not commit or participate in the murder; but that if he did he was at the time insane.

80 As to this allegation, wherein the Burt case is unlike the case at bar, it is sufficient to say that it was held that the judgment of the court which convicted Wm. E. Burt was based on a legal ascertainment that he was sane and that he was guilty of murder, which precluded further inquiry. It follows therefore that it was necessary in that case to decide identically the same question in principle which is presented in the case at bar.

In neither the Burt case nor here was there an express stipulation forbidding the company to contest its liability. It is true that in the opinion in the Burt case it is said that—"public policy forbids the insertion of a condition [the so-called "incontestable clause"] which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." It may be, as is insisted by counsel, that this language can be properly regarded as a dictum, as there was in the Burt policy no clause of the character thus declared to contravene public policy. But this leaves the facts in the Burt case in principle the same as in the case at bar, and the

question necessarily decided there was the one presented here. On the express ground that—"it cannot be that one of the risks covered by a contract of insurance is the crime of the insured," and that "there is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy," it was there decided that the plaintiffs could not recover.

There is a doctrine, supported by some more or less persuasive authority, to the effect that, where public policy forbids the enforcement of a life insurance policy in behalf of those who claim under a felon and would otherwise be the beneficiaries, the court will seek a hand capable of taking and will enforce the policy for the benefit of such person. It seems to me that there are two reasons why this doctrine, if sound, cannot apply here.

(1) As I construe section 4 of the charter there is no force in the contention that either the executors or the children of the insured have become members of the company, and have acquired a right otherwise than through and under the insured.

(2) As I read the opinion in the Burt case it requires this court to hold that the parties to the contract of insurance here did not contemplate the possibility that the insured might commit a capital felony and thereby bring about his own death, and that therefore the contract does not embrace the contingency of the death of the insured thus brought about. "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured." Again, in making the contract of insurance the insured impliedly obligated himself "to do nothing to wrongfully accelerate the maturity of the policy." It follows that the insurance company is under no obligation to pay the sum demanded to anyone. Hence there can be no power in this court to apply the doctrine contended for.

It also follows that we are not concerned to ascertain the public policy of the state of Wisconsin, and that much the greater part of the exhaustive and admirable brief of the learned counsel for the claimants cannot be considered by this court. It can, as I think, only be considered by the Supreme Court when asked to overrule the Burt case.

The question of estoppel can be very briefly disposed of. The insured at the time the policy was issued gave his note, payable in six months, for \$427.50, the amount of the premium for eighteen months. This note was payable, not to the company, but to the local solicitors personally. They in turn executed their note, for the same amount due at the same time, to the personal order of T. A. Cary, the state agent of the company, to which the note of the insured was attached as collateral, and both notes were sent to Mr. Cary. He thereupon sent the amount of the premium in cash to the company. The company had no knowledge concerning the making of the notes. After the charge of murder had been made against the insured and while he was in jail on the charge, but while still protesting his innocence, he paid the note by checks drawn to the order of "T. A. Cary, Gen'l Ag't."

It seems to me that the payment by Mr. Cary to the company,

long before the murder, completed the contract; absolved the insured of any liability to the company for this premium, and left Cary, personally, the creditor of the insured. In other words, even if there were otherwise room for a possible application of the doctrine of estoppel, there is here no foundation for such claim. The company in no sense received any premium payment after the charge of murder had been made against the insured.

From the foregoing the necessary conclusion is that neither the executors nor the children have a right to recover.

As to the premium money, I am of opinion that it should in part be ordered paid to the executors. The death of the insured came about under circumstances not contemplated by the parties to the contract and hence is a contingency not covered by the contract.

82 *Quoad* such a beath there is no contract and the consideration, except for the insurance from March 15, 1904, until Feb'y 10th, 1905, should be returned. Between the dates mentioned there was a contract and a risk by the company. In the judgment to be entered I shall apportion the fund in the registry as thus indicated.

We are now brought to the consideration of some questions rather technical in character. This proceeding was instituted in the state court, from which it was removed to this court, by a bill in equity and attachment served on a garnishee. The legatees, children of the insured, are the complainants and the executors, alleged in the bill to be claiming as against the children the right to enforce the policy, are made defendants. Counsel have agreed, as they are interested only in securing a speedy determination on the merits, that no objection will be founded on the mere misarrangement or misjoinder of parties, and that either or both the executors and the children may be considered as parties plaintiff. However, I call attention to these facts because of their bearing on the question as to whether it is the law side or the equity side of this court on which this controversy should be determined.

From what has already been said it seems clear that we cannot hold this a case in which the executors, having the (apparent) legal right to recover are forbidden by public policy to take and that the children have a beneficial, as distinguished from a legal, interest entitling them to sue. As a matter of law, I think that the (apparent) right to sue is vested in the executors and in them only. Schouler Ex'ors and Adm'rs, (2d ed.), pages 318-321; 326; Code 1904, secs. 2706, 2708. It follows that this is in its essential nature an assertion of a cause of action which is purely legal, and not equitable in character.

It is believed that the state statute (sec. 2964, Code 1904), which authorizes the prosecution of a purely legal cause of action by bill in equity and attachment, does not on removal give the federal court on its equity side jurisdiction of such an action as is the one at bar. That the existence of the lien of an attachment (acquired only at or after the institution of the suit) does not change this result, seems to be established by the following authorities. *Scott v. Neely*, 140 U. S., 106; *Cates v. Allen*, 149 U. S., 451; *Hollins v. Brierfield*, 150 U. S.,

371, 378; Putney v. Whitmire, 66 Fed., 388; Tompkins v. Catawba Mills, 82 Fed., 782; Bank v. Prager, 91 Fed., 692; Visquesney v. Allen, 131 Fed., 21. Under these cases, if I read them correctly, the lien which can give a federal equity court jurisdiction must have been in existence prior to the institution of the suit.

It follows that this cause would regularly be ordered docketed on the law side of this court and the (proper) plaintiffs required to file a declaration. Under the agreement of counsel this course is not necessary. The jury has been waived by proper stipulation. As the court is to decide the case, the bill can under the agreement be treated as a declaration, filed by the proper parties, and the judgment of the court entered in the common law order book.

The answer of the defendant company contains what is in effect a plea of payment into court under sections 3296, 3297 Code 1904. Under the facts here this defendant should be adjudged its costs.

HENRY C. McDOWELL,
District Judge.

Judgment of Court.

Filed November 24, 1906.

And at another day, to-wit: At a term of the Circuit Court of the United States for the Western District of Virginia, held at Lynchburg, on Saturday, the 24th day of November, 1906:

Present: Honorable Henry C. McDowell, District Judge.

McCUE

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE Co. et al.

This day came the parties, by their attorneys, and, by stipulation signed by counsel, waived a trial by jury, and submitted all matters both of law and fact to the court, and further agreed the facts, by writings duly signed and filed. And said parties, by their attorneys, further agreed and requested the court to treat and consider the executors under the will of J. S. McCue as parties plaintiff herein as well as the infant children of said McCue. And the court having considered the pleadings, the agreed facts and the arguments of counsel, doth now render the following verdict:

I find for the defendants, the Northwestern Mutual Life Insurance Company and the Peoples National Bank of Charlottesville.

And thereupon it is considered by the court that the plaintiffs take nothing by their bill, and that said defendant go without day, and that the defendant, said Insurance Company, recover of the plaintiffs, the executors hereinafter named, and Marshall Dinwiddie, the next friend of the infant plaintiffs, its costs in this behalf expended.

It is further considered by the court that of the sum of \$427.50, heretofore paid into the registry of this court by said Insurance

Company, the clerk of this court do pay to the said company the sum of \$256.34 (pre-iums from March 15, 1904, to February 10, 1905,) and also such further sum as equals the costs expended herein by said company, to be taxed by said clerk subject to review by this court; and that said clerk do pay to Wm. H. McCue, Chas. M. McCue, Leslie H. McCue and O. E. McCue, executors under the will of J. S. McCue, the remainder, if any, of said sum of \$427.50.

Nov. 24, 1906.

Enter:

HENRY C. McDOWELL,
District Judge.

Stipulation of Counsel, Waiving a Jury and Submitting all Questions of Law and Fact to the Court.

Filed November 24, 1906.

In the Circuit Court of the United States for the Western District of Virginia.

McCUE et al.

vs.

N. W. MUT. LIFE INS. CO.

Whereas it may be that this cause is legal, rather than equitable, in nature, and that it should be tried on the law side of this court; it is therefore now agreed by counsel that in any event a jury is waived and all questions both of law and fact are to be determined by the court.

WHITE, TUNSTALL & WILLCOX,

For the Northwestern Mut'l Life Ins. Co.

D. HARMON,

G. B. SINCLAIR,

Att'ys for McCue's Ex'ors & for Complainants.

APPEAL PROCEEDINGS.

Petition for Writ of Error.

Filed March 1, 1907.

In the Circuit Court of the United States for the Western District
of Virginia.

No. 1385.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby G. McCue, Infants, Who Sue by Marshall Dinwiddie, Their
Next Friend, and William H. McCue, Leslie H. McCue, and
Edward O. McCue, Survivors of Themselves and Chas. M. Mc-
Cue, Executors of Jas. S. McCue, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and THE
PEOPLES NATIONAL BANK OF CHARLOTTESVILLE, VA., Defend-
ants.

Petition for Writ of Error.

And now come J. William McCue, Samuel O. McCue, Harry M. McCue, and Ruby G. McCue, infants, who sue by their next friend, Marshall Dinwiddie, and William H. McCue, Leslie H. McCue and Edward O. McCue, survivors of themselves and Chas. M. McCue, executors of Jas. S. McCue, deceased, plaintiffs, herein, and say that on or about the 24th day of November, 1906, this court entered judgment herein in favor of the defendants and against these plaintiffs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Fourth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and such other and further proceedings may be had as may be proper in the premises.

G. B. SINCLAIR,
D. HARMON,
Att'ys for Plaintiffs.

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Assignment of Errors.

Filed March 1, 1907.

In the Circuit Court of the United States for the Western District of Virginia.

No. 1385.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and Ruby G. McCue, Infants, Who Sue by Marshall Dinwiddie, Their Next Friend, and William H. McCue, Leslie H. McCue, and Edward O. McCue, Survivors of Themselves and Chas. M. McCue, Executors of Jas. S. McCue, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and THE PEOPLES NATIONAL BANK OF CHARLOTTESVILLE, VA., Defendants.

Assignment of Error.

And now come the plaintiffs in the above numbered and styled cause, by their attorney, and say that in the records and proceedings aforesaid there is manifest error in this, to-wit:

(First.) This suit was instituted in the Corporation Court of the City of Charlottesville as a suit in equity. It was brought under the Virginia statute, which authorized the suit to be brought in equity, whether the claim be legal or equitable, and the statute expressly provides that "The proceedings therein shall be the same as in other suits in equity."

The chief contention of the plaintiffs is that their rights are legal rights arising out of a simple contract, which by the state law are enforceable in equity, the state statute under which the suit was brought allows equitable relief in aid of a legal claim, and the prayer of the bill is for the enforcement of these legal rights. Such a claim is not cognizable by a court of equity of the United States and a blending of remedies, such as is provided for by the state statute, is not permissible in the courts of the United States, and the Circuit Court of the United States is consequently without jurisdiction in this cause.

Second. While the chief contention of the plaintiffs is that their rights are legal rights, yet the bill presents a claim on the part of the heirs of Jas. S. McCue, deceased, for alternative relief, which is purely equitable, and authorized by the Virginia statute; that when this suit was converted into an action of law, these plaintiffs were thereby deprived of the opportunity of relying on this equitable ground of relief to which they were entitled.

Three. 1. That the petition does not show on its face such diverse

citizenship or a separable controversy such as entitles the non-resident defendant to remove the cause.

2. That it is not a suit of which the United States Circuit Court has original concurrent jurisdiction with the State Court.

(Fourth.) The court erred in its verdict and judgment in favor of the defendants, under the law and facts in the case. The Northwestern Mutual Life Insurance Company were liable for the amount of this policy, and should have been required to pay the same.

(Fifth.) The court erred in its judgment awarding to the defendant, The Northwestern Mutual Life Insurance Company, any portion of the four hundred and twenty-seven dollars and fifty cents (\$427.50) paid by it into court.

Wherefore plaintiffs pray that said judgment be reversed.

G. B. SINCLAIR,

D. HARMON,

Att'ys for Plaintiffs.

And at another day, to-wit: At a term of the Circuit Court of the United States for the Western District of Virginia, held at Lynchburg, on Wednesday, the 6th day of March, 1907:

Present: Hon. Henry C. McDowell, District Judge.

Order Reserving Power and Right to Sign Bills of Exceptions at Any Day of Next Regular Term.

Filed March 6, 1907.

In the United States Circuit Court for the Western District of Virginia, Continued and Held at Lynchburg, in and for said District, on March 6, 1907.

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Hon. Henry C. McDowell, District Judge.

McCUE et al.

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE Co. et al.

For reasons appearing sufficient to the court, the power and right to settle and sign bills of exception in this cause at any day of the next regular term of this court is hereby reserved.

Enter:

HENRY C. McDOWELL,

District Judge.

March 6, 1907.

Bill of Exceptions.

Filed March 27, 1907.

In the United States Circuit Court for the Western District of
Virginia.

J. WILLIAM McCUE et al.

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and THE
PEOPLE'S NATIONAL BANK, OF CHARLOTTESVILLE, VIRGINIA.

Bill of Exceptions.

Be it remembered, that on the trial of this cause in this court at the September term, A. D., 1906, of the said court, the Honorable Henry C. McDowell presiding, that the following proceedings were had, to-wit: The following stipulation was made and signed by counsel, to-wit:

McCUE et al.

vs.

N. W. MUT. LIFE INS. CO.

Whereas it may be that this cause is legal, rather than equitable, in nature, and that it should be tried on the law side of this court; it is therefore now agreed by counsel that in any event a
89 jury is waived and all questions both of law and fact are to be determined by the court.

WHITE, TUNSTALL & WILLCOX,

For the Northwestern Mut'l Life Ins. Co.

D. HARMON,

G. B. SINCLAIR,

Att'ys for McCue's Ex'ors & for Complainants.

And thereupon the following agreed statement of facts, which constitute all the facts and evidence in the cause, were submitted to the court, to-wit:

Agreed Facts.

Filed October 8, 1906.

In the Circuit Court of the United States for the Western District of
Virginia.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby G. McCue, Infants Under the Age of Twenty-one Years, Who
Sue by Marshall Dinwiddie, Their Next Friend,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et als.

The following are agreed to be facts and to be used as evidence in the above entitled cause in lieu of depositions:

1. That J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, stated in the bill filed in this cause to be plaintiffs suing by their next friend, Marshall Dinwiddie, are sole heirs of the late James S. McCue.

2. That William H. McCue, Chas. M. McCue, L. H. McCue and E. O. McCue are the duly qualified executors of the said James S. McCue under the latter's will, a certified copy of which is herewith filed as a part of this statement.

3. That the said executors, on the 25th day of February, 1905, filed with the Northwestern Mutual Life Insurance Company proof of the death of the said J. S. McCue, which proof of loss is admitted to be the same filed with the answer of the said defendant company in this cause, and to be used in evidence as if a part of this statement.

4. That the said James S. McCue had made written application to the said defendant company for the said policy No. 576,576, the original of which application is filed with the answer of the defendant company in this cause, and shall be used as evidence in this cause, subject to any exceptions to be taken thereto as to its admissibility as evidence. The said application was signed by the said James S. McCue in his own proper handwriting.

5. That pursuant to the said application, the said Insurance Company did issue its policy No. 576,576 on the life of the said James S. McCue for fifteen thousand dollars (15,000), upon which the said James S. McCue paid the premiums at the time and under the circumstances as hereinafter shown.

6. That the original of the said policy No. 576,576, is herewith produced by the said executors of the said J. S. McCue, and filed as a part of this statement as evidence in the cause, subject to exception as to the admissibility as evidence of the copy of the application thereto attached.

7. That the said Northwestern Mutual Life Insurance Company, the defendant in this cause, is a corporation duly organized under the laws of the State of Wisconsin, and a citizen and resident thereof.

8. That the charter of the said company consists of a number of the Acts of the General Assembly of the State of Wisconsin, which are herewith filed as a part of this statement, and to be used as evidence in this cause, and the said company is a mutual life insurance company, with the power and obligations given to and imposed upon it by the said several Acts of the Wisconsin Legislature.

9. That the Peoples National Bank of Charlottesville, Va., was made a party to this proceeding as garnishee, and that at the time of the service of the process or summons upon it in this cause, it had in its possession belonging to the defendant company, the sum of \$_____ in cash and premium receipts for the current month duly executed for delivery to policy holders amounting to \$_____, and that the said bank had no interest in this suit other than as such garnishee.

10. The following statement is taken from the records of the Corporation Court of Charlottesville, Va., in the suit

brought to settle the estate of J. S. McCue and from the report of the Master Commissioner of the Court and decree of said Court confirming report:

J. Samuel McCue Est.

Statement of Receipts and Disbursements, Assets and Liabilities, as per Report of M. Gordon, "Commissioner," and Confirmed by Decree of Court.

Receipts.

From Insurance Co. on life of J. S. McCue.....	\$44,702.95
From all other sources.....	6,012.86
	<hr/>
	\$50,715.81

Disbursements.

Paid out for all purposes.....	50,307.37
	<hr/>
Bal. on hand.....	\$408.45

Assets and Liabilities.

Real estate see report Com. assets.....	\$31,250.00
Am't liabilities.....	14,485.87
	<hr/>

Value of estate above liabilities..... \$16,764.13

11. It is agreed that the said J. S. McCue mentioned in the policy 576,576 is the same person mentioned in transcript from the record of the Corporation Court of Charlottesville in the case of Commonwealth of Virginia vs. J. S. McCue, filed with the answer of the defendant company; that the said transcript is a correct copy of said records, and that the said J. S. McCue, before his death, admitted that his sentence was just; and that he is also the same person whose name is mentioned in the proof of loss filed with the answer of the defendant company in this cause.

12. The premium of \$427.50 on said policy was paid as follows: When the policy was delivered to the insured, he gave his note, hereto attached, for \$427.50, to E. L. Carroll and L. Fitzgerald, dated March 15, 1904, for the premium of said policy. Said note

92 was payable to the order of said E. L. Carroll and L. Fitzgerald six months after date, at the Jefferson National Bank, Charlottesville, Va. Said Carroll and Fitzgerald at the time were engaged in soliciting insurance for T. A. Cary, who was at that time and continued to be general agent in Virginia of the Northwestern Mutual Life Insurance Company. The said note was endorsed by the said Carroll and Fitzgerald and sent to Mr. Cary, with the memorandum attached, written by E. L. Carroll, in the following words:

"\$427.50. Hold this note in Mr. Cary's office (don't use in bank.)

Notify Mr. McC. about thirty days before due, and send it to E. L. Carroll for collection."

The said Carroll and Fitzgerald gave their individual notes to Mr. Cary, amounting to \$427.50, on which he advanced the money to the company and held these notes for collection, with McCue's note attached as collateral.

The company, at its home office at Milwaukee, received the whole amount of premium, viz.: \$427.50, in cash from Cary, May 2, 1904, and had no knowledge of the note arrangement between McCue and Carroll and Fitzgerald and Cary.

Said note was paid by McCue by his checks hereto attached, on the dates named in said checks. At the time the note was paid, McCue had been arrested and was in jail, though he protested that he was innocent, which facts were then known to Mr. Cary.

It was a general custom, in soliciting agents for the company, to take the notes of applicants for their premium and give their individual note to the general agent of the company for the same amount, with note of the applicant attached as collateral, and the said general agent make settlement with the company in cash for said premium, reimbursing himself out of the payment of such note when made by applicant. The following writings connected with the said transaction are herewith filed as part of this statement: Note given by McCue, dated March 15, 1904, with the memorandum attached thereto; two checks of McCue given in payment of the note, Sept. 10, 1904, and Sept. 15, 1904; true copies of two letters from McCue to T. A. Cary, dated Sept. 10, 1904, and Sept. 15, 1904; and two letters from T. A. Cary, General Agent, to McCue, dated Sept. 13, 1904, and Sept. 16, 1904.

13. The type in which the policy is printed is larger than that commonly known as Long Primer, but the type in the copy of the application which is attached to the policy is all smaller than that commonly known as Long Primer.

93 The type in which the original application is printed, with the exception of the first line on each page, is smaller than that commonly known as Long Primer, but the black-faced type at the beginning of each paragraph or question, while smaller is more conspicuous than that commonly known as Long Primer. This agreement as to the type is subject to exception by the defendant company on the ground that the fact is immaterial and the evidence inadmissible. The original of said application is herewith filed as a part of this statement.

Octo. 6, '06.

G. B. SINCLAIR,

D. HARMON,

Att'ys for Pltfs. & for J. S. McCue's Ex'rs.

NORTHWESTERN MUTUAL LIFE INS. CO.,

By WHITE, TUNSTALL & WILLCOX, *Its Att'ys.*

EXHIBIT FILED WITH AGREED FACTS.

(Will of James S. McCue, Deceased)

I, J. Samuel McCue, of Charlottesville, Va., do make this my last will & testament—I desire that all of my just debts shall be paid as soon as may be conveniently done. I devise, bequeath, grant & give my entire estate, real & personal & mixed of every kind & description to my four beloved & darling children (James William McCue, Samuel Overton McCue, Ruby Grigsby McCue and Harry Moon McCue) share & share alike—And I appoint & designate as Executors of my estate my four following & beloved brothers, William H. McCue, Charles M. McCue, Leslie H. McCue & Edward O. McCue & while I have entire confidence in their integrity, yet I deem it best that they give some bonded or guarantee company or corporation as security. And I further designate & appoint William H. McCue as guardian of James William McCue, Charles M. McCue as guardian of Harry Moon McCue, Leslie H. McCue as guardian of Ruby Grigsby McCue, and Edward O. McCue as guardian of Samuel Overton McCue.—And I further designate & appoint my four above mentioned brothers as trustees for my said four above mentioned children, for the three boys until they respectively obtain their majority—or become twenty-one years of age & for my said daughter (Ruby Grigsby McCue) continuously—& they may use such portions of her share of my estate as they may deem proper for her use and benefit, & as may be necessary for her comfort & proper station in life—and my said daughter's portion or share of my estate is to be & remain absolutely her separate estate free
94 from the debts or obligations of any husband or husbands that she may perchance have—And I desire & direct that my darling daughter (Ruby Grigsby McCue) be reared by & remain in the custody of my darling Aunt (Mrs. Marie Sammie Dinwiddie) as I know that she will be a mother indeed to her, & as she has verily been to me—I expressly authorize & empower my above mentioned executors of my estate to sell or rent any or all of my real estate, & such sales may be private or public as they may deem most judicious—and to use the rents, profits or proceeds for the use & support of such or my children as in their opinion may require the same.

Out of any funds coming into their hands my executors shall keep up the fire insurance on any of my property & they are also authorized to pay any interest on liens on the said property so as to prevent any sacrifice of the same, of course any expense attending the security required of the above executors &c. shall be borne by my estate. I also direct & authorize my said executors to apply as much as two hundred dollars (\$200.00) of my estate to & for the purpose of assisting in the erection of a suitable monument at the graves of my late beloved parents (James C. McCue & Sallie Jane McCue). And now most earnestly commending all of the above

mentioned & darling ones to His infinite mercy, loving kindness & "all abounding grace"—And God grant that we shall eventually be an unbroken circle above.

Given under my hand this 10th day of September, 1904.

J. SAMUEL McCUE.

At a Corporation Court Held for the City of Charlottesville, Va.,
Feb. 20th, 1905.

This paper writing purporting to be the last will and testament of J. Samuel McCue, dec'd, was produced in court and proved by the oaths of W. R. Duke and W. L. Maupin, who deposed in open court that they were well acquainted with the handwriting of the testator, having frequently seen him write, and that they verily believed that the body thereof, as well as the signature thereto, is wholly in the handwriting of J. Samuel McCue. And thereupon said paper writing is considered fully proven and ordered to be recorded as the last will & testament of J. Samuel McCue, dec'd.

Teste:

W. L. MAUPIN,
Deputy Clerk.

A Copy—Teste:

R. W. DUKE, *Clerk.*

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EXHIBIT FILED WITH AGREED FACTS.

(Act of Incorporation of the Mutual Life Insurance Company of the State of Wisconsin and Acts Amendatory Thereof.)

UNITED STATES OF AMERICA,

State of Wisconsin,

Department of State, ss:

To All to Whom These Presents Shall Come, Greeting:

I, W. L. Houser, Secretary of State of the State of Wisconsin and Keeper of the Great Seal thereof, do hereby certify that the annexed copy of laws relating to the "Mutual Life Insurance Company of the State of Wisconsin," including a law changing the name of said company to "The Northwestern Mutual Life Insurance Company," being Chapter 129, Private and Local Laws 1857; Chapter 169, Private and Local Laws 1858; Chapter 35, Private and Local Laws 1859; Chapter 323, General Laws 1863; Chapter 1, General Laws 1835; Chapter 371, Private and Local Laws 1869; Chapter 329, Private and Local Laws 1870; Chapter 192, General Laws 1882; Chapter 199, Laws 1885; Chapter 328, Laws 1887; have been compared by me with the original enrolled Acts on file in this Department, and that the same is a true copy thereof, and of the whole of such original enrolled Acts.

In testimony whereof, I have hereunto set my hand and affixed

my official seal of the State at the Capitol, in the City of Madison, this 11th day of September, A. D., 1905.

[Seal of Secretary of State, State of Wisconsin.]

F. M. MINER,

Assistant Secretary of State.

Chapter 129.

Private and Local Laws, 1857.

An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin.

The People of the State of Wisconsin represented in Senate and Assembly do enact as follows:

SECTION 1. Thomas Lappin, M. C. Smith, W. W. Holden, David Noggle, Edward McKey, Solomon Hutson, James H. Knowlton, John P. Dickson, Joseph A. Sleeper, Edward I. Dimock, B. F. Pixley, John Hackett, John M. Keep, Matt. H. Carpenter, Charles Kuehn, Simeon Mills, James Niel, J. F. Willard, John Mitchell, James R. Doolittle, George C. Northrop, H. J. Ullman, Anson Eldred, H. H. Camp, J. B. Martin, Luke Stoughton, L. J. Farwell, H. L. Donsman, J. Allen Barber, John H. Rountree, George W. Lee, James H. Earnest, A. Ludlow, James Bintliff, Peter Myers and Lucius G. Fisher, and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be and are declared a body politic and corporate by the name of "Mutual Life Insurance Company of the State of Wisconsin," and by that name may contract and be contracted with, sue and be sued, defend and be defended against in any and all courts.

SECTION 2. This corporation shall have no powers or privileges, except such as are expressly granted by this charter.

SECTION 3. The corporation hereby created, shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess and convey shall —

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business.

2d. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted, or for money due.

3d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case, or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company, and the convenient transaction of its business, shall be sold and

disposed of within six years after the said company shall have acquired title to the same.

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, 97 and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer.

SECTION 5. All the corporate powers of the said Board of Trustees, and such officers and agents as they may appoint. The Board of Trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of the corporation, and they shall have power to declare by By-Laws, what number of Trustees less than a majority of the whole, but not less than nine shall be a quorum for the transaction of business, and nine shall be such quorum, until otherwise provided by By-Laws. The Trustees shall also have power to make all such By-Laws as shall be needful or proper to the due exercise of the powers hereby granted.

SECTION 6. The persons named in this Act shall constitute the first Board of Trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the second class—expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice—but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The Board of Trustees may fill any vacancies in their number occasioned by death, resignation or by removal from the State. The election of trustees shall be held on the first Monday of June, in each and every year, at such place in the city of Janesville, as the Board of Trustees shall designate, of which they shall give at least four weeks' previous notice in two of the public newspapers printed in Milwaukee, Madison and Janesville, and the Board of Trustees at the same time shall appoint three of the members of the said corporation, Inspectors to preside at such election, and if any of said Inspectors decline or fail to attend, the trustees shall appoint others to fill such vacancies.

SECTION 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time 98 he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the Trustees, and no premium so paid shall ever be withdrawn from said Company, except as hereinafter provided, but shall be liable to all the losses and expense incurred by this Company during the continuance of its charter.

SECTION 8. The Trustees shall determine the rates of Insurance and the sums to be insured.

SECTION 9. It shall be lawful for said corporation to invest the said premiums in the securities designated in the two following sections, and to sell, transfer and change the same, and re-invest the funds of said corporation when the trustees shall deem expedient.

SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages, or unincumbered real estate within this State. The real estate or other property to secure such investment of capital, shall in every case, be worth twice the amount loaned thereon.

SECTION 11. The trustees shall have power to invest a certain portion of the premiums received not to exceed one-half thereof in public stocks of the United States, or of this State, or of any incorporated city of this State.

SECTION 12. Suits at law may be maintained by said corporation against any of its members for any cause relating to the business of said corporation. Suits at law may also be prosecuted and maintained by any member against said corporation, for loss by death if payment is withheld more than three months after the Company is duly notified of such losses, and no member of the corporation shall be debarred his testimony as a witness in any such cause on account of interest in such suit, or of his being a member of said company, and no member of the corporation not being in his individual capacity, a party to such suit, shall be incompetent as a witness in any such suit on account of his being a member of said company.

SECTION 13. The officers of said Company, at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of said Company, and in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; any member who would be entitled to share in the profits, who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the Company. No member except officers of the Company, and agents thereof, shall be personally liable for the losses of the Company, and such officers and agents, severally, shall be liable but only for the losses arising by reason of their own respective neglect or misconduct.

SECTION 14. On some day in the first thirty days after the expiration of the first five years, from the time when the said Company shall issue its first policy, and within the first thirty days of every subsequent five years, the officers of said Company shall cause to be made a general balance statement of the affairs of said Company, which shall be entered in a book prepared for that purpose, which shall be subject to the examination of every member of the Com-

pany, during the usual hours of business, for the term of thirty days thereafter. Such statement shall contain:

1st. The amount of premiums received during said period.

2d. The amount of expenses of said Company during the same period.

3d. The amount of losses incurred during said period.

4th. The balance remaining with the said Company.

5th. The nature of the security on which the same is invested or loaned, and the amount of cash on hand. The said Company shall also make and transmit to the Secretary of State, on the first Monday of January, in each year, a full statement of its affairs, in the same or like manner as moneyed corporations are required to do.

SECTION 15. The operations and business of this corporation shall be carried on in the city of Janesville, at such place as the Trustees shall direct, so far as the same can be done at a principal office.

100 SECTION 16. No policy shall be issued by said Company until application shall be made for insurance in the aggregate for two hundred thousand dollars at least. The trustees shall have the right to purchase for the benefit of the Company, all policies of insurance or other obligations issued by the said Company.

SECTION 17. It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent as her Trustee, to cause to be insured for her sole use, the life of her husband for any definite period, or for the term of his natural life, and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors, but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable after death to her children, for their use, and to their guardian, if under age.

SECTION 18. This Act shall be perpetual, but the Legislature may at any time alter or amend the same.

SECTION 19. This Act is hereby declared a public act, and shall be printed by the State printer immediately, and when so printed, the same shall take effect and be in full force.

WYMAN SPOONER

Speaker of the Assembly.

ARTHUR McARTHUR,

Lieut. Gov. and President of Senate.

Approved March 2, 1857.

COLES BASHFORD.

Chapter 169.

Private and Local Laws, 1858.

An Act to Amend an Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin. Approved March 2. 1857.

101 The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. The Mutual Life Insurance Company of the State of Wisconsin shall have a common seal, and shall have power to make re-insurance of any risks which they may have taken, and may make all such by-laws not inconsistent with the constitution and laws of this State, as may be deemed necessary for the appointment of its officers and agents, and the conduct of its affairs in the various cities and towns of this State, and of sister States, and foreign Governments, as the said corporation may deem most for its interest.

SECTION 2. Any officer, agent or trustee, who shall be convicted of having abstracted or taken any money or evidence of debt, or property belonging to this corporation, and shall have disposed of it or have placed it beyond the reach of the officers of this corporation, without having first had authority from the Board of Trustees, or from the Finance Committee, by a resolution entered upon their books so to do, shall be deemed guilty of a felony, and shall be adjudged to pay a fine in a sum not exceeding five times the amount of the sum proved to have been abstracted, and shall be sentenced to confinement in the State prison for not more than five years, in the discretion of any court having cognizance thereof.

SECTION 3. Any member of this Company shall have the right to vote by proxy as well as in person.

SECTION 4. It is hereby declared that in the judgment of the Legislature of this State the objects of the foregoing amendments cannot be attained under general laws.

SECTION 5. This Act shall take effect and be in force from and after its passage.

F. S. LOVELL,

Speaker of the Assembly.

H. H. GILES,

President of the Senate pro Tem.

Approved April 24, 1858.

ALEX. W. RANDALL.

102

Chapter 35.

Private and Local Laws, 1859.

An Act to Amend the Charter of the Mutual Life Assurance Company of the State of Wisconsin.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. The annual report required to be made by section one of chapter one hundred and three of the general laws of 1858, may be made by the "Mutual Life Assurance Company" of the State of Wisconsin, in the month of June of each and every year.

SECTION 2. The words "in the city of Janesville," where they occur in the sixth and fifteenth sections of the Act incorporating said Company, are hereby stricken out.

SECTION 3. This Act shall take effect and be in force from and after its passage.

WM. P. LYON,
Speaker of the Assembly.
E. D. CAMPBELL,

Lieutenant Governor and President of the Senate.

Approved February 23, 1859.

ALEX. W. RANDALL.

Chapter 323.

General Laws, 1863.

An Act to Amend Chapter One Hundred and Twenty-nine of the Private and Local Laws of 1857 Entitled "An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin."

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. Section five of Chapter One Hundred and Twenty-nine of the Private and Local Laws of 1857, entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," is hereby so amended as to read as follows, viz.:

103 "SECTION 5. All the corporate powers of the said Company shall be vested in, and exercised by, a Board of Trustees, and such committees and officers and agents as they may appoint. The Board of Trustees shall consist of thirty-six persons. They shall elect a President annually, who shall be a trustee and a member of the corporation, and they shall have power to declare by By-Law, what number of trustees, less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business, and nine shall be such quorum, until otherwise provided by By-Law. The trustees shall have power to make all such By-Laws as shall be needful or proper to the exercise of the powers hereby granted."

SECTION 2. Section six of the said Act is hereby so amended as to read as follows, viz.:

"SECTION 6. The persons named in this Act shall constitute the first Board of Trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the sec-

and class shall expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice, but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The Board of Trustees may fill any vacancies in their number occasioned by death, resignation or in any other manner. The election of Trustees shall be held at the office of said Company in the City of Milwaukee, on the second Wednesday of June in each year, of which they shall give at least four weeks' previous notice in one or more of the public newspapers printed in Milwaukee and Madison, and the Board of Trustees at the same time shall also appoint three of the members of the said corporation Inspectors, to preside at such election; and if any of said Inspectors decline, or fail to attend, the Trustees shall appoint others to fill such vacancies."

SECTION 3. Section ten of the said Act is hereby so amended as to read as follows:

"SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages on unincumbered real estate. The real estate or property to secure such investment or capital, shall in every case be worth twice the amount loaned thereon."

SECTION 4. Section eleven of said Act is hereby so amended as to read as follows, viz.:

"SECTION 11. The Trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States or of this State, or of any incorporated city of this State, and the Company may loan to policyholders in said Company, from time to time, sums not exceeding one-half of the annual premiums on their policies, upon notes to be secured by the policy of the person to whom the loans may be made."

SECTION 5. The said Company may cause a balance to be struck of the affairs of said Company, and a dividend of its profits to be made among the members thereof, as provided in section thirteen of the said Act of incorporation thereof, annually, biennially, triennially, or once in five years, as the Board of Trustees may determine, and the dividend of profits when so made, may, at the option of each member entitled thereto, and with the consent of the Board of Trustees, be appropriated to the purchase of additional insurance, or in reduction of, or toward the payment of annual premiums, or credited to the insured, to be paid over at the decease of the insured, to the person entitled to receive the same, in the same manner, and upon the same conditions, as the amount insured by the policy of such member.

SECTION 6. This Act shall take effect and be in force from and after its passage.

J. ALLEN BARBER,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved March 23, 1863.

EDWARD SALOMON, *Governor.*

105

Chapter 1.

General Laws, 1865.

An Act to Change the Name of the Mutual Life Insurance Company of the State of Wisconsin.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. That the corporate name of the Mutual Life insurance Company of the State of Wisconsin, a corporation duly created by and organized pursuant to an Act entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, and the several Acts amendatory thereof, be, and the same is hereby changed to "The Northwestern Mutual Life Insurance Company," and by the latter name the said "The Mutual Life Insurance Company of the State of Wisconsin" shall hereafter be known in all courts and places, and enjoy the same corporate rights and franchises, and be subject to the same duties, obligations and liabilities, as by said former name; and the said corporation may hereafter sue and be sued, plead and be impleaded, answer and be answered unto, in all courts and places by the said name of "The Northwestern Mutual Life Insurance Company," for, upon, and by reason of any contract, liabilities, or cause of action, made, had, incurred or suffered by said corporation, prior to the time this Act shall take effect, with the same effect and in the same manner as if the same had been made, had, incurred, or suffered in and by the said name of "The Northwestern Mutual Life Insurance Company."

SECTION 2. The annual meeting of the members of said Company for the purpose of electing trustees thereof, shall, after the year (A. D.) 1865, be held on the second Wednesday of January in each year, and the Trustees who shall be elected at the annual meeting of the said Company, which shall be held on the second Wednesday of June, A. D., 1865, shall hold their offices until the second Wednesday, of January, one thousand eight hundred and sixty-nine, and the term of office of those trustees now in office, which would expire, but for the passage of this Act, on the second Wednesday of June in the years one thousand eight hundred and sixty-six, one thousand eight hundred and sixty-seven and one thousand eight hundred and sixty-eight, shall expire, and their successors may be

106 chosen at the annual meeting to be held on the second Wednesday of January in each of said years respectively. The trustees elected at the annual meeting to be held on the second Wednesday of January, A. D., 1866, and annually thereafter, shall hold their respective offices for four years unless sooner removed according to law.

SECTION 3. This Act shall take effect and be in force from and after the first day of March, A. D., one thousand eight hundred and sixty-five.

WM. W. FIELD,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved January 20, 1865.

JAMES T. LEWIS,
Gov. Wisconsin.

Chapter 371.

Private and Local Laws, 1869.

An Act to Amend an Act Entitled "An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin," Approved March 2d, 1857, and the Several Acts Amendatory Thereof.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. Section eleven of an Act entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, is hereby so amended as to read as follows:

"SECTION 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city of this State. And the company may loan to policyholders in said company, from time to time, sums not exceeding one-half the annual premiums on their policies, upon notes to be secured by the policy of the person to whom the loans may
107 be made: Provided, however, that the said Trustees are hereby authorized, at their discretion, to invest so much of the assets of the said company in the State bonds or other securities of any State of the United States in which they may desire to transact the business of Life Insurance as may be necessary to comply with the requirements of the laws of such State relating to Life Insurance Companies incorporated by other States."

SECTION 2. This Act shall take effect and shall be in force from and after its passage.

A. M. THOMASON,
Speaker of the Assembly.

G. C. HAZELTON,
President of the Senate Pro Tem.

Approved March 9, 1869.

LUCIUS FAIRCHILD, *Governor.*

Chapter 329.

Private and Local Laws, 1870.

An Act to Amend Chapter 129 of the Private and Local Laws of 1857, Entitled "An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin," Approved March 2, 1857, the Name of which has Since Been Changed to the "Northwestern Mutual Life Insurance Company," and the Several Laws Amendatory Thereof.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 129 of the Private and Local Laws of 1857, entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, the name of which corporation was changed to the "Northwestern Mutual Life Insurance Company," by an Act entitled "An Act to change the name of the Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and published and designated as chapter one of the supplement to Private and Local Laws of 1865, is hereby amended by inserting in the
108 said original Act immediately after section eighteen, the following to stand as sections 19, 20 and 21.

SECTION 19. The annual meeting of the members of the said Northwestern Mutual Life Insurance Company, for the purpose of electing trustees thereof, shall be hereafter held on the last Wednesday of January in each year, and the trustees elected at each annual election hereafter held, shall hold their respective offices for four years, unless sooner removed according to law; except such as may be elected to fill vacancies, who shall hold their respective offices until the expiration of the term of office of the class of trustees to which they may respectively belong. The trustees now in office, shall hold their respective offices until the day of the annual election, at which their successors are to be elected, pursuant to this section, unless sooner removed according to law.

"SECTION 20. No person shall be eligible to the office of trustee of the said Company, unless he shall have effected an insurance upon his own life for the benefit of himself, his wife, heirs or representatives for at least five thousand dollars, which shall be in full

force and effect, on which he shall have paid the premium for at least one year. Every trustee of the said Company shall, during his whole term of service, be a citizen of the United States, and at least two-thirds of all the trustees of the said Company who may be hereafter elected, shall have resided in this State one year next preceding their election, and be residents of the same during their continuance in office. The number of persons eligible to the office of trustee in said company, equal to the number of trustees to be elected at each annual election, who shall receive the highest number of votes cast thereat, shall be chosen trustees. An insurance of at least one thousand dollars effected by a person upon his own life, or upon the life of another for his own benefit, or the benefit of his wife, heirs or personal representatives, shall be necessary to entitle any member to a vote, and each member shall be entitled to one vote for each one thousand dollars of insurance he may have effected in said Company as aforesaid, such insurance being in force at the time of the election.

"SECTION 21. Members of said Company may vote by proxies dated and executed within sixty days next preceding and returned to the chief office of the said Company, for examination and registry upon the books of the Company at least three days previous to

the meeting of the members of the Company, at which the same are to be used, but no person shall be allowed to cast

by proxy more than one hundred votes in addition to the votes to which he may be entitled as a member of the Company, on his own insurance; and no officer, trustee, agent or employee of said Company shall act or be entitled to vote as proxy for an absent member

SECTION 2. Section nineteen of said original Act is hereby numbered Section 22, and section two of Chapter one of the supplement to the Private and Local Laws of 1865, entitled "An Act to change the name of the Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and all provisions of the Act of which this Act is amendatory, conflicting with the provisions of this Act, are hereby repealed.

SECTION 3. This Act shall take effect and be in force from and after its passage.

J. M. BINGHAM,
Speaker of the Assembly.
 THAD. C. POUND,
President of the Senate.

Approved March 15th, 1870.

LUCIUS FAIRCHILD, *Governor.*

Chapter 192.

General Laws, 1882.

An Act to Change the Time of Holding the Annual Meeting of the Members of the Northwestern Mutual Life Insurance Company for the Election of Trustees and Officers.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. The annual meeting of the members of the Northwestern Mutual Life Insurance Company, to be held in the year 1883, for the purpose of electing trustees and officers thereof, shall be held on the third Wednesday of July, 1883, and such annual meeting shall thereafter be held on the third Wednesday of July, in each year, and the trustees elected at each annual election hereafter held, shall hold their respective offices for four years unless sooner removed according to law, except such as may be elected to fill vacancies, who shall hold their respective offices until the expiration of the term of office of the class of trustees to which they may respectively belong. The trustees now in office shall hold their respective offices until the day of the annual election at which their successors are to be elected, pursuant to this section, and the present officers shall hold their respective offices until the annual meeting to be held on the third Wednesday of July, A. D., 1883, unless sooner removed according to law.

SECTION 2. This Act shall take effect and be in force from and after its passage and publication.

SAM. S. FIFIELD,

President of the Senate.

FRANKLIN L. GILSON,

Speaker of the Assembly.

Approved March 23, 1882.

J. M. RUSK, *Governor.*

Chapter 199.

Laws, 1885.

An Act to Amend an Act Entitled An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin, Approved March 2, 1857, and the Several Acts Amendatory Thereof.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. Section 3 of an Act entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, is hereby amended by striking out the word "immediate" in the eighth line of said section, and also by

striking out the word "six" in the twenty-fifth line of said section, and inserting in lieu thereof the word "ten," and by adding to said section the following, viz: "unless said corporation shall procure

a certificate from the commissioner of insurance of this State that it will suffer materially from a forced sale thereof, in which event the sale may be postponed for such period as such commissioner may therein direct; provided, that whenever any real estate occupied by said corporation in the transaction of its business shall no longer be required for that purpose, by reason of the occupation of other real estate for the same purpose, or for any other cause, such real estate shall be sold within ten years after the time it shall cease to be so acquired, subject, however, to the right of postponement above mentioned;" so that said section, when amended, shall read as follows, viz: SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess and convey shall be:

1st. Such as shall be requisite for its accommodation in the convenient transaction of its business.

2d. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted, or for money due.

3d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case, or for any other purpose; and all such real estate as shall not be necessary for the accommodation of said company in the convenient transaction of its business, shall be sold and disposed of within ten years after the said company shall have acquired title to the same, unless said corporation shall procure a certificate from the commissioner of insurance of this State that it will suffer materially from a forced sale thereof, in which event the sale may be postponed for such period as such commissioner may therein direct; provided, that whenever any real estate occupied by said corporation in the transaction of its business, shall no longer be required for that purpose, by reason of the occupation of other real estate for the same purpose or for any other cause, such real estate shall be sold within ten years after the time it shall
112 cease to be so occupied, subject, however, to the right of postponement above mentioned.

SECTION 2. This Act shall take effect and be in force from and after its passage and publication.

SAML. S. FIFIELD,

President of the Senate.

HIRAM O. FAIRCHILD,

Speaker of the Assembly.

Approved March 31, 1885.

J. M. RUSK, *Governor.*

Chapter 328.

Laws, 1887.

An Act to Amend an Act Entitled "An Act to Incorporate the Mutual Life Insurance Company of the State of Wisconsin," Approved March 2, 1857, and the Several Acts Amendatory Thereof.

The People of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SECTION 1. Section 10 of Chapter 129 of the Private and Local Laws of 1857, entitled "An Act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, as amended by Section 3 of Chapter 323 of the General Laws of 1863, is hereby, amended by inserting the words "or notes" after the word "bonds" in the fifth line of said Section 3, and by striking out the word "or" in the seventh line of said Section 3, and inserting in lieu thereof the word "of," so that said Section 10, when amended, shall read as follows, viz: "SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds or notes secured by mortgages on unencumbered real estate. The real estate or property to secure such investment of capital, shall in every case be worth twice the amount loaned thereon."

113 SECTION 2. Section 13 of said Chapter 129, as modified and amended by Section 5 of Chapter 323 of the General Laws of 1863, is hereby amended by striking out that part of said Section 13, from the beginning thereof, to and including the words "the same" in the twelfth line thereof, and by striking out that part of said Section 5 from the beginning thereof to and including the words "may determine," and by inserting in lieu thereof the words "the said company may make distribution of its surplus or profits, on equitable principles, annually, or once in two, three, four or five years, in such amounts as the trustees thereof may determine. In determining the amount to be distributed, they shall hold such funds in reserve, as they may consider sufficient to enable the company to meet its obligations, but in no case less than the aggregate net value of all the outstanding policies, computed by the American Experience Table, with interest not exceeding four and one-half per cent.," so that said Section 13, when amended, shall read as follows, viz: "SECTION 13. The said Company may make distribution of its surplus or profits, on equitable principles, annually, or once in two, three, four or five years, in such amounts as the trustees thereof may determine. In determining the amount to be distributed, they shall hold such funds in reserve as they may consider sufficient to enable the Company to meet its obligations, but in no case less than the aggregate net value of all the outstanding policies, computed by the American Experience Table, with interest not exceeding four and one-half per cent. The dividend of profits, when

so made, may, at the option of each member entitled thereto, and with the consent of the Board of Trustees, be appropriated to the purchase of additional insurance, or in reduction of, or toward the payment of annual premiums, or credited to, the insured, to be paid over at the decease of the insured to the person entitled to receive the same, in the same manner and upon the same condition as the amount insured by the policy of such member. Any member who would be entitled to share in the profits who shall have omitted to pay any premium or any periodical payment due from him to the company may be prohibited by the trustees from sharing in the profits of the Company. No member except officers of the Company and agents thereof shall be personally liable for the losses of the Company, and such officers and agents severally shall be liable, but only for the losses arising by reason of their own respective neglect or misconduct."

SECTION 3. Section 17 of said Chapter 129, relating to insurance for the benefit of married women, is hereby repealed.

114 SECTION 4. This Act shall take effect and be in force from and after its passage and publication.

CHARLES K. ERWIN,
President pro Tem of the Senate.
T. B. MILLS,
Speaker of the Assembly.

Approved April 6th, 1887.

J. M. RUSK, *Governor.*

EXHIBITS FILED WITH AGREED FACTS.

(Notes and Checks Given by James S. McCue and Correspondence Between James S. McCue and T. A. Cary.)

(Note Given by James S. McCue, Dated March 15, 1904.)

\$427.50. CHARLOTTESVILLE, VA., March 15, 1904.

Six months after date I promise to pay to the order of E. L. Carroll & L. Fitzgerald four hundred & twenty-seven & 50-100 dollars, negotiable and payable without offset at Jefferson National Bank, Charlottesville, Va.

Homestead and all other exemptions waived by the maker and each endorser.

Value received.

J. SAMUEL McCUE.

(Memorandum Attached to Note.)

\$427.50.

Hold this note in Mr. Cary's office (Don't use in bank) notify Mr. McC. about 30 days before due and send it to E. L. Carroll for collection.

(Evidence of Payment on Face of Check.)

Reed. paymt.

One check for \$285.00

One check for 142.50

\$427.50

Sept. 16, '04.

T. A. CARY.

W. A. WATKINS, *Cashr.*

115 (Check Given by James S. McCue, Dated September 10, 1904.)

J. Samuel McCue,
Attorney and Counselor at Law,
Charlottesville, Va.

No. 581.

SEPT. 10TH, 1904.

Pay to the order of T. A. Cary, Gen. Agt., \$285.00 Two hundred & eighty-five dollars.

Premium on Policy #576,576 (due by note) Sept. 15, 1904, on my life in Northwestern Mutual Life Ins. Co. of Milwaukee, Wis.

J. SAMUEL McCUE.

To the Jefferson National Bank, Charlottesville, Va.

(Endorsements on Check.)

T. A. Cary, G. A.

W. A. Watkins, Cashier.

Pay to the order of The State Bank of Virginia, Richmond, Va.
T. A. CARY.

Pay Bank of Albemarle, Charlottesville, Va., or order, The State Bank of Virginia, Richmond, Va.

WILLIAM M. HILL, *Cashier.*

Paid Sep. 14, 1904.

The Bank of Albemarle, Charlottesville, Va.

Paid Sep. 14, 1904.

The Jefferson National Bank of Charlottesville, Va.

116 (*Check Given by James S. McCue, Dated September 15, 1904.*)

J. Samuel McCue,
Attorney and Counsellor at Law,
Charlottesville, Va.

No. 596.

SEPT. 15TH, 1904.

Pay to the order of T. Archibald Cary, Gen. Agt., \$142.50-100
One hundred & forty-two & 50-100 dollars.

Bal. on premium on policy #576,576 to Sept. 15, 1905, one
& a half years.

J. SAMUEL McCUE.

To the Jefferson National Bank, Charlottesville, Va.

(Endorsement on Check.)

T. A. Cary, G. A.

W. A. Watkins, Cashr.

Pay to the order of The State Bank of Virginia, Richmond, Va.
T. A. CARY.

Pay Bank of Albemarle, Charlottesville, Va., or order, The State
Bank of Virginia, Richmond, Va.

WILLIAM M. HILL, *Cashier.*

Paid Sep. 17, 1904.

The Bank of Albemarle, Charlottesville, Va.

Paid Sept. 17, 1904.

The Jefferson National Bank, of Charlottesville, Va.

117 (*Letter from J. Samuel McCue to T. A. Cary, Agent, &c.,
Dated September 10, 1904.*)

Copy.

SEPT. 10th, 1904.

T. A. Cary, Esq., Agt. N. W. Life Ins. Co., Richmond, Va.

DEAR SIR: Enclosed you will please find check #581 on the Jeff.
N. Bank for \$285.00, premium due on policy #576,576 in the
Northwestern Mutual Life Ins. Co. on life, due the 15th
inst., & for which amt. you have my note endorsed and transferred
to you by E. L. Carroll, District Agt. Advise me promptly of re-
ceipt of enclosed check, and send me my said note endorsed paid
by check #381 as above.

Very truly yours,
(Signed)

J. SAMUEL McCUE.

(Letter from T. A. Cary, Agent, &c., to J. Samuel McCue, Dated September 13, 1904.)

Northwestern Mutual Life Insurance Company of Milwaukee, Wis.

T. Archibald Cary,
Successor to John B. Cary & Son,
General Agent for Virginia & North Carolina,
1201 Main St.

RICHMOND, VA., Sept. 13, 1904.

Mr. J. Samuel McCue, Attorney at Law, Charlottesville, Va.

DEAR SIR: Replying to your favor of the 10th inst., enclosing check for \$285 in payment of your note endorsed by E. L. Carroll and Littleton Fitzgerald for \$427.50, please remit by early mail \$142.50, balance due on same, and I will forward the note duly receipted as requested in your letter of the 10th inst. I thank you for your attention to same.

Yours very truly,

T. A. CARY,
General Agent.

WAW-MH.

118 *(Letter from J. Samuel McCue to T. A. Cary, Agent, &c., Dated September 15, 1904.)*

Copy.

SEPT. 15th, 1904.

T. Archibald Cary, Esq., Richmond, Va.

DEAR SIR: I only had the policy which showed \$285.00, so you will find enclosed check for \$142.50—one hundred & forty-two 50-100 dollars—and which with \$285 makes the \$427.50.

Send note promptly showing have been paid by my two checks.

Very truly yours,

J. SAML. McCUE.

(Letter from T. A. Cary, Agent, &c., to J. Samuel McCue, Dated September 16, 1904.)

Northwestern Mutual Life Insurance Company of Milwaukee, Wis.

T. Archibald Cary,
Successor to John B. Cary & Son,
General Agent for Virginia & North Carolina,
1201 Main St.

RICHMOND, VA., Sept. 16, 1904.

Mr. J. Samuel McCue, Attorney at Law, Charlottesville, Va.

DEAR SIR: Replying to your remittance of the 15th inst. for \$142.50 balance due on your note dated March 15th, 1904, for

\$427.50, I herein hand you said note duly cancelled. I thank you for your attention to same.

Yours very truly,

T. A. CARY,
General Agent.

WAW-MH.

119 And thereupon, the court having considered the pleading, the agreed statement of facts and the arguments of counsel, rendered the following verdict:

"I find for the defendants, The Northwestern Mutual Life Insurance Company and the Peoples National Bank of Charlottesville."

Upon which said verdict judgment was by the court entered up against the plaintiffs.

And thereafter, to-wit: on March 1, 1907, which was during the same term at which the aforesaid judgment was rendered (which term came to an end on March 11, 1907,) the undersigned judge of said court received from counsel for plaintiffs an assignment of errors, a paper intended as a bill of exceptions and so marked, a petition for writ of error and a petition for appeal. Accompanying said papers was the following letter, dated February 28, 1907:

Judge H. C. McDowell, Lynchburg, Va.:

DEAR SIR: I am returning by express to Mr. McCauley, the clerk, the papers in the case of McCue v. Northwestern Mut. Life Ins. Co. I enclose herewith petition for writ of error, assignment of error, bill of exceptions, and order awarding writ of error.

Owing to the uncertainty as to whether this is a law or equity proceeding, I also enclose a petition for appeal, which seems to be the proper course to pursue in view of this uncertainty. See *McFadden v. Mt. View M. & M. Co.*, 36 C. C. A., 357; *Hurst v. Hollingsworth*, 94 U. S., 111.

In regard to the assignment of error relating to the question of jurisdiction, &c. It seems to me pretty clear that you have not got jurisdiction of this cause. See *First National Bank v. Prager*, 34 C. C. A., 54. The principle of that case is applicable here and as it was decided by the Circuit Court of Appeals of this circuit, it seems to me to be conclusive.

I regret that I have not been able to let you have these papers sooner, but it was a physical impossibility for me to do so. I am sending a copy of this letter to Mr. White.

Sincerely yours,

D. HARMON.

The paper endorsed bill of exceptions which was received by the undersigned on March 1, 1907, reads as follows:

120 "In the Circuit Court of the United States for the Western District of Virginia.

No. 1385.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE and Ruby G. McCue, Infants, Who Sue by Marshall Dinwiddie, Their Next Friend, and William H. McCue, Leslie H. McCue and Edward O. McCue, Survivors of Themselves, and Chas. M. McCue, Executors of Jas. S. McCue, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and The Peoples National Bank of Charlottesville, Va., Defendants.

Bill of Exceptions.

Be it remembered that on the trial of this cause in this court at the September term, A. D., 1906, of the said court, the Honorable Henry C. McDowell presiding, that the following proceedings were had, to-wit: The following stipulation was made and signed by counsel, to-wit:

McCUE et al.

vs.

N. W. MUT. LIFE INS. CO.

Whereas it may be that this cause is legal, rather than equitable, in nature and that it should be tried on the law side of this court; it is therefore now agreed by counsel that in any event a jury is waived and all questions both of law and fact are to be determined by the court.

WHITE, TUNSTALL & WILCOX,

For the Northwestern Mut'l Life Ins. Co.

D. HARMON,

G. B. SINCLAIR,

Attys. for McCue's Exors. & for Complainants.

And thereupon the following agreed statement of facts, which constitute all the facts and evidence in the cause, were submitted to the court, to-wit:

(Copy here the agreed statement of facts and the Exhibits therewith.)

(See same copied on pages 109-147 of this transcript. See printed page 89, et seq.)

121 And thereupon, the court having considered the pleading, the agreed statement of facts and the arguments of counsel, rendered the following verdict:

"I find for the defendants, The Northwestern Mutual Life Insurance Company and the Peoples National Bank of Charlottesville."

Upon which said verdict judgment was by the court entered

up against the plaintiffs, to all of which the plaintiffs excepted and moved the court to set aside the said verdict and grant them a new trial on the following ground, to-wit: That this being an equity suit, the court erred in converting it into an action at law. And that the said verdict and judgment of the court were contrary to the law and the evidence, judgment should have been rendered for the plaintiffs. And the plaintiffs further moved the court to dismiss the case from this court on the ground that it was without jurisdiction. After consideration of the said motions and argument of counsel, the court overruled the same.

Thereupon the plaintiffs tender this, their bill of exceptions to the action of the court in the various particulars therein set out and pray that the same may be settled and allowed and signed and sealed by the court and made part of the record in this cause, which is accordingly done during the aforesaid September term of the said court this — day of ———

The counsel for defendant, The Insurance Company, making objection to the bill of exceptions as tendered, and the judge of the court being too unwell to fix a day for hearing counsel on the question of the propriety of the bill of exceptions then tendered, did during the term of the court, on March 6, 1907, enter the following order: "For reasons appearing sufficient to the court the power and right to settle and sign bills of exception in this cause at any day of the next regular term of this court is hereby reserved."

Be it further remembered that on March 27th by agreement of counsel the respective counsel met with the undersigned in chambers at Lynchburg and thereupon the counsel for the plaintiffs stated that they understood that their bill of exceptions was intended as a motion to set aside the judgment of the last term on the grounds stated in the said proposed bill of exceptions, which is above quoted. The undersigned thereupon stated to counsel that he did not understand that said tendered bill of exceptions embodied such a motion, but that if he had so understood, the power to pass on the same would have been reserved and that the same would now be overruled.

122 Be it further remembered that the counsel for defendants insist that at the time of the hearing and argument which preceded the rendition of the judgment in this cause it was agreed by counsel that the parties desired nothing but a decision on the merits of the case, and the undersigned is constrained to certify that such was his understanding. It should be further stated that during the hearing there was no objection made to the jurisdiction of the court and that the first objection thereto—if such it can be considered—is contained in the above copied tender of the bill of exceptions and letter of February 28, 1907.

The foregoing is now this March 27th, 1907, signed and sealed and ordered made a part of the record.

HENRY C. McDOWELL, [L. s.]
District Judge.

And at another day, to-wit: At a term of the Circuit Court of the Circuit Court of the United States for the Western District of Virginia, Held at Lynchburg, on Wednesday, the 27th Day of March, 1907.

Order Allowing Writ of Error.

Filed March 27, 1907.

The Circuit Court of the United States for the Western District of Virginia.

At Law. No. 1385.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE and Ruby G. McCue, Infants, Who Sue by Marshall Dinwiddie, Their Next Friend, and William H. McCue, Leslie H. McCue and Edward O. McCue, Survivors of Themselves, and Chas. M. McCue, Executors of Jas. S. McCue, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and The Peoples National Bank of Charlottesville, Va., Defendants.

This 27 day of March, 1907, came J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants who sue by Marshall Dinwiddie, their next friend, and Wm. H. McCue, Leslie H. McCue and Edward O. McCue, survivors of themselves and Chas. M. McCue, executors of Jas. S. McCue, deceased, plaintiffs, by their attorney, and filed herein and presented to the court their petition, praying for the allowance of a writ of error; an assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Judicial Circuit; and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error to the said J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants who sue by Marshall Dinwiddie, their next friend, and Wm. H. McCue, Leslie H. McCue and Edward O. McCue, survivors of themselves and Chas. M. McCue, executors of Jas. S. McCue, deceased, plaintiffs, upon the defendants giving bond, according to law, in the sum of \$500, which shall operate as a supersedeas bond, on condition that said bond be executed with surety to be approved by a judge of this court, within 20 days from this date.

HENRY C. McDOWELL,

District Judge.

Petition for Appeal.

Filed March 27, 1907.

In the Circuit Court of the United States for the Western District of Virginia.

In Equity. No. 1385.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE and Ruby G. McCue, Infants, who Sue by Marshall Dinwiddie, Their Next Friend, and William H. McCue, Leslie H. McCue, and Edward O. McCue, Survivors of Themselves, and Chas. M. McCue, Executors of Jas. S. McCue, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and The Peoples National Bank of Charlottesville, Va., Defendants.

The above named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the 24th day of November, 1906, in the above entitled cause, and it being uncertain whether this cause is to be treated as a suit in equity or an action at law, they have filed a petition for a writ of error to the said order and judgment and do now hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors, which is filed with the said petition for the writ of error, and the same is also filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit.

G. B. SINCLAIR.

D. HARMON,

Attorneys for Plaintiffs.

March 27, 1907.—An appeal is hereby granted to the Circuit Court of Appeals of the United States for the Fourth Circuit.

HENRY C. McDOWELL.

District Judge.

Writ of Error.

Filed March 27, 1907.

J. WILLIAM McCUE and Others, Infants, who Sue by Marshall Dinwiddie, Their Next Friend, and James S. McCue's Executors, Plaintiffs,

VS.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and The Peoples National Bank of Charlottesville, Va., Defendants.

Writ of Error.

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Western District of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants, who sue by Marshall Dinwiddie, their next friend, and William H. McCue, Leslie H. McCue, and Edward O. McCue, survivors of themselves and Charles M. McCue, executors of James S. McCue, deceased, plaintiffs in error, and The Northwestern Mutual Life Insurance Company and the Peoples National Bank of Charlottesville, Va., defendants in error, a manifest error hath happened to the great damage of the said plaintiffs as by their complaint appears:

We, being willing, that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at the city of Richmond, in the state of Virginia, on April 25, 1907, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of March, in the year of our Lord nineteen hundred and seven.

[SEAL OF COURT.]

WM. McCAULEY,

*Clerk of the Circuit Court of the United States
for the Western District of Virginia.*

Clerk's Office of the United States for the Western District of Virginia, the 27th day of March, 1907.

I hereby certify that a copy of the within writ of error was this day filed in the Clerk's Office of said Court at Lynchburg, Va.

WM. McCAULEY, *Clerk.*

126

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Northwestern Mutual Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, in the city of Richmond, Virginia, on thirty days from this date pursuant to a writ of error and appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Virginia, at Lynchburg, wherein J. W. McCue et al. are plaintiffs in error and appellants, and you are defendant in error and appellee, to show cause, if any there be, why the judgment or decree rendered against the said plaintiffs in error and appellants as in the said writ of error and appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry C. McDowell, United States District Judge this the 27th day of March, 1907.

HENRY C. McDOWELL,
United States District Judge.

Stipulation of Counsel as to Papers to be Omitted from Transcript.

Filed March 27, 1907.

J. W. McCUE et al.

v.

NORTHWESTERN MUTUAL LIFE INS. CO.

It is hereby agreed that the policy of insurance, the application for the insurance and declaration to Medical Examiner, the proof of claim need be copied but once in the transcript of record.

D. HARMON,

G. B. SINCLAIR,

Att'ys for Plaintiff.

WHITE, TUNSTALL & WILLCOX.

Att'ys for Northwestern Mutual Life Insurance Co.

127 Circuit Court of the United States for the Western District of Virginia.

Petitioners' Bond and Approval.

Filed April 5, 1907.

McCUE, etc.,

v.

N. W. MUT. LIFE INS. CO.

Know all men by these presents: That we, William H. McCue, Leslie H. McCue and Edward O. McCue, executors of James S. McCue, deceased, as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound to the defendant-in error, the Northwestern Mutual Life Insurance Company and The Peoples National Bank of Charlottesville, Va., in the full and just sum of five hundred dollars (\$500), to be paid to the said defendants, the Northwestern Mutual Life Insurance Company and the Peoples National Bank of Charlottesville, Va., their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, as executors as aforesaid, by these presents.

Sealed with our seals, and dated this 4th day of April, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Circuit Court of the United States for the Western District of Virginia, in a suit pending in said court, between J. William McCue, Samuel O. McCue, Harry M. McCue and Ruby G. McCue, infants who sue by Marshall Dinwiddie, their next friend, and William H. McCue, Leslie H. McCue, and Edward O. McCue, surviving executors of James S. McCue, deceased, plaintiffs, and The Northwestern Mutual Life Insurance Company and The Peoples National Bank of Charlottesville, Va., defendants, a judgment was rendered against the said plaintiffs, and the said plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Northwestern Mutual Life Insurance Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Fourth Circuit, to be holden at the City of Richmond on the — day of —

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ of error to effect and answer
128 all damages and costs if they fail to make the said plea good,
then the above obligation to be void, else to remain in full force and virtue.

[Seal of American Bonding Company of Baltimore, Incorporated 1894.]

WM. H. McCUE, [SEAL.]
LESLIE H. McCUE, [SEAL.]
EDWARD O. McCUE, [SEAL.]
Executors of J. S. McCue, Deceased, Only.

AMERICAN BONDING COMPANY
OF BALTIMORE,

By E. O. McCUE, *Its Vice-President.*

Attest:

LYNN C. WOODS,
Assistant Secretary.

Sealed and delivered in the presence of—

April 5, 1907.

Approved:

HENRY C. McDOWELL.

Order for Transcript of Record.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

WM. McCAULEY, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,

Western District of Virginia, ss:

I, William McCauley, Clerk of the Circuit Court of the United States for the Western District of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption mentioned, now of record and on file in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Lynchburg, in said district, this 20th day of April, in the year of our Lord, 1907, and in the 131st year of the Independence of the United States of America.

[SEAL OF COURT.]

WM. McCAULEY,

*Clerk of the Circuit Court of the United States
for the Western District of Virginia.*

Fee for transcript of record \$71.40.

129 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 739.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and Ruby G. McCue, Infants, by Marshall Dinwiddie, Their Next Friend, and Others, Plaintiffs in Error,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and Others, Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

April 24, 1907, transcript of the record is filed and the cause docketed.

Same day, appearance of Daniel Harmon and G. B. Sinclair for the plaintiffs in error, order filed.

May 15, 1907, appearance of William H. White and William H. White, Jr., for the defendants in error, order filed.

May 24, 1907, twenty copies of the printed record are filed.

Certificate of Clerk as to Omission in Record.

Filed July 23, 1907.

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Charlottesville.

I, R. W. Duke, Clerk of the Corporation Court of the City of Charlottesville, do hereby certify, that in the petition of The Northwestern Life Insurance Company et als., plaintiffs, vs. J. William McCue & others, by &c., defendants, filed October 16th, 1905, for the removal of the said cause from the said Corporation Court to the United States Circuit Court for the Western District of Virginia. I find in the seventh (7th) line of the body of the said petition, the words "and citizens," written with a pen, above and immediately after "and still is, a resident" in typewriting, and I also find that these words "and citizens" are omitted in the copy of the record of this cause in the United States Courts.

Given under my hand and the seal of the Corporation Court of the City of Charlottesville, Va., this the 10th day of June, 1907.

R. W. DUKE, Clerk.

The foregoing is a true copy of a certificate made by R. W. Duke, Clerk of the Corporation Court of the City of Charlottesville, Virginia, supplying an omission in the copy of the petition of the Northwestern Mutual Life Insurance Company, for the removal of

the cause of J. William McCue & als. against the said company & als. from the said Corporation Court to the United States Circuit Court for the Western District of Virginia, as the same appears in the transcript of the record of the proceedings of the said cause in said Corporation Court, which was filed in the said United States Circuit Court—said certificate having been filed in the Clerk's Office of the said Circuit Court at Lynchburg, on the 11th day of June, 1907.

Given under my hand and the seal of said United States Circuit Court this 20th day of July, 1907.

[SEAL OF COURT.]

WM. McCAULEY, *Clerk*.

Nov. 27, 1907, (November Term, 1907,) the cause is continued in open court.

Feb. 4, 1908, (February Term, 1908,) cause came on to be heard before Circuit Judge Pritchard and District Judges Waddill and Dayton, and is argued by counsel and submitted.

July 17, 1908, (May Term, 1908,) upon motion in open court, leave is granted plaintiffs in error to file supplemental brief and the right to defendants in error to file reply.

November 5, 1908, (November Term, 1908,) the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed Nov. 5, 1908.

131 United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE
and Ruby G. McCue, Infants, by Marshall Dinwiddie, Their Next
Friend, Plaintiffs in Error,

versus

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Western
District of Virginia, at Lynchburg.

[Argued February 4, 1908. Decided November 5, 1908.]

Before Pritchard, Circuit Judge, and Waddill and Dayton, District
Judges.

Daniel Harmon and G. B. Sinclair (Harmon & Walsh and Walker
& Sinclair on the brief) for appellants, and Wm. H. White and
Wm. H. White, Jr., for appellees.

On March 15, 1904, the Northwestern Mutual Life Insurance
Company issued to James McCue, of Charlottesville, a ten year
renewal life policy for \$15,000 based upon an application

made by him therefor on February 25th, preceding.

132 The policy provided that in event of death payment would be made to such beneficiary or beneficiaries as might thereafter be nominated, provided that, if no beneficiary survived the insured, then the payment should be made to his executors, administrators or assigns. The application designated "my estate" as the person for whose benefit the insurance was desired. The policy provided that no liability should arise on the part of the company until the first premium should be actually paid. By arrangement made by McCue with Carroll and Fitzgerald, local agents soliciting the insurance, instead of actually paying the first premium he executed to them his note for \$427.50, payable in six months, which sum was to cover premiums for eighteen months from the date of the policy, or until September 15, 1905. Carroll and Fitzgerald sent this note with one of their own as collateral to Cary, the company's state agent, who remitted the \$427.50 in cash to the company in due course of business. On September 7th, following, eight days before this note of his became due, McCue was arrested and lodged in jail charged with the murder of his wife. While so in jail under such charge, on September 15th, when said note became due, he paid it to Cary, the company's state agent. He was subsequently tried and convicted upon the murder charge and on February 10th, 1905, was executed.

This suit was brought by foreign attachment in equity by the infant heirs at law against the company, The People's National Bank of Charlottesville, as garnishee, and the executors of said decedent. Subsequently, by stipulation of counsel, the facts were agreed, all questions as to whether the cause should be considered a law or equitable one, as to the right to trial by jury, or as to whether parties were misjoined, were waived and the whole matter was submitted to the court who found for the defendant and thereupon both writ of error and appeal *was* taken to this court. Here the sole assignment of error relied on is that "The court erred in its verdict and judgment under the law and the facts in the case." It is admitted that the defendant insurance company is a strictly mutual one, incorporated by special act of the Legislature of Wisconsin; that its charter gave it "the power to insure the lives of its respective members, and to make all and every insurance appertaining to or connected with life risks, and to grant and purchase annuities." Membership in the company was to be effected by

taking out insurance and "Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation and no longer." Trustees and officers of the company are required to be selected from such membership. Dividends are required to be distributed to such membership from the profits secured by the company.

DAYTON, *District Judge* (after stating the facts as above):

We cannot refrain from expressing our admiration for the learning, research and ability displayed by counsel on both sides, in both oral arguments and in the briefs filed by them. It is not our purpose to discuss in detail all the points raised. To do so would consume too much time and space. On behalf of the defendant company it is insisted that "there can be no recovery on a life insurance policy where the insured is legally executed, the policy being silent on the subject." First: Because death on the gallows was not one of the risks against which decedent was insured. Second: Even if it had been a risk specially contracted for, a recovery under such circumstances would be contrary to public policy. On the other hand it is contended: First: That this company, incorporated by special statute of Wisconsin, was expressly given the right "to insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks," and having this power, admitted McCue into membership, thereby giving him a vested interest in the corporation, and bound itself to pay the policy "upon receipt and approval of proofs of the fact and cause of his death" without any condition against such death occurring by the *the mandate of the law*.

Second. That the obligation of this contract is controlled by the law of Wisconsin, that public policy affecting ordinary business transactions between citizens is determined by state laws and the special statute of that state has settled the question of public policy adverse to the general rule relied on by the company.

Third. That, if this were not so, the peculiar facts and conditions arising in this case take it outside of the application of this rule of public policy. In reply, it is insisted that this insurance policy, in this court must be construed under the rules of general commercial law and not under local state statutes.

We need have little trouble in disposing of the first ground of defense to the effect that death by the mandate of the law was not one of the risks insured against by decedent's policy. It is well understood that the insurance companies generally have adopted a policy of incorporating into their policies exceptions to risks not desired to be undertaken by them. For instance, in this policy in controversy the company required McCue to agree that if he should "pass south of the tropic of cancer, or be previously engaged in blasting, mining or submarine operations, or in the production of highly inflammable or explosive substances, or in electrical employment where the voltage is over six hundred, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping car conductor, mail agent, express messenger or baggage-master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace) without the written consent of said company, or shall within one year from the date of said policy, whether sane or insane, die by my (his) own hand" then the policy should be null and void. When it is remembered that this company was

expressly authorized by its charter to "insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks;" that no exception for death by mandate of the law was incorporated among these many other exceptions; that the company's general state agent allowed the decedent, after commission of the crime and when in custody to answer therefor, to pay the note executed by him for the eighteen months' premium due, we are not prepared to hold that this risk was not one contemplated by the company when it executed this contract.

The case therefore resolves itself, in practical effect, to a solution of the question whether the contract, by reason of the manner of the death, was made absolutely void through considerations of public policy. And here we are involved in very great doubt and perplexity by reason of the conflict that exists in the decisions of many of the state courts themselves, and between those of many of the state courts and of the Federal courts as to what constitutes the public policy touching cases of this kind and others involving similar principles.

135 Counsel for the company in support of their position confidently rely upon these four cases:

Amicable Society v. Boland, 4 Bligh N. S., 194.

Burt v. Union Central Ins. Co., 187 U. S., 362.

Ritter v. Mutual Life Ins. Co., 169 U. S., 139.

Collins v. Met. Life Ins. Co., 27 Pa. Supr., 353.

The Boland case was decided by the House of Lords in England in 1830. There, Fauntleroy, insured, was guilty of forgery, then a capital offense, declared bankrupt, his insurance policy with other effects was assigned to Boland and others as trustees. He was tried upon the forgery charge, convicted and hung. His assignees sought to recover upon his insurance policy. The lower court gave judgment but the House of Lords reversed it and held that to allow recovery would be against public policy. It is insisted by counsel for appellants that this decision was determined largely by reason of the law of attainder then in force in England, but that since the abolition of this law with its attendant forfeiture of goods and corruption of blood, by 33 Victoria, in 1870, the principle of public policy set forth in this Boland case has been greatly modified, if not reversed by the Maybrick case, (*Cleaver v. Mutual, etc., Life Association*, 1 Q. B. D., 147) where it was held that although Mrs. Maybrick, who had poisoned her husband and been convicted, could not directly take the proceeds of her wrong, yet, if, by a reasonable construction of the contract resulting in the avoidance of forfeiture, even if such construction resulted in establishing a trust fund for the benefit, in part, of Mrs. Maybrick, yet this could furnish no defense to the insurance company. In this case the Master of Rolls, all the other judges concurring, says:

"When people vouched that rule (of public policy) to excuse themselves from the performance of a contract in respect to which they had received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to

be carried a step further than the protection of the public requires."

136 Again, in *Moore v. Woolsey*, 4 E. & B. Q. B., 243 (82 E. C. L.), where the policy itself stipulated death by duelling, by suicide, or by the hands of justice, should be void as to the executors or administrators of the decedent and remain in force only to the extent of any previous interest which may have been acquired by any other person under an actual assignment by deed, for a valuable consideration, etc., and when decedent was a suicide, Lord Campbell, C. J., says:

"Where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal: and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee."

Whether or not the law of attainder had a controlling influence in the determination of the *Boland* case is immaterial, for certain it is it should have no influence here, as we in this country have never recognized this law, and its operation has been expressly prohibited by our national constitution and by those of most of the states, and by an act (1790) of Congress.

Turning now to the decisions of our state courts, we find,

(a) By the great majority of the state decisions it has been held that suicide is not excepted from the risks assumed by the
137 insurer, unless the policy was taken out with intention to commit suicide and defraud the insurer.

Patterson v. Ins. Co., 100 Wis., 118.

Supreme Conclave, &c., v. Miles, 92 Md., 613.

Estabrook v. Ins. Co., 54 Me., 224.

Grand Lodge, &c., v. Wieting, 168 Ill., 408.

Kerr v. Association, 39 Minn., 174.

Schultz v. Ins. Co., 40 Ohio St., 217.

John Hancock Co. v. Moore, 34 Mich., 46.

Conn. Mut. Life Co. v. Groom, 86 Pa., 92.

Darrow v. Society, 116 N. Y., 537.

If this be true then it necessarily follows that, if McCue in this case, after killing his wife, actuated by the remorse and terror that

follows such a deed had taken his own life then there could be no question but what, under these decisions, his infant children could derive the benefit of this insurance; and the application of the doctrine of public policy in this case must be enforceable only because he did not go a step farther and commit the two crimes of murder and self-destruction instead of the one alone.

(b) It has been held that for the beneficiary in an insurance policy to feloniously kill the insured in order to reap the benefit of such insurance will clearly defeat the contract so far as he or any one holding through him is concerned, upon the clearest principle of public policy. But on the other hand, it has been held in the Maybrick case, as we have shown, that if the proceeds of the policy go not direct to the guilty beneficiary but to a trust fund constituted, in part, for his benefit, then public policy will not intervene and defend the insurer from the enforcement of his contract.

(c) "Statutes of descent have generally been held not to exclude an heir or devisee from the benefits of these statutes on the ground that the heir or devisee had feloniously and intentionally destroyed the life of the person from whom the legacy or inheritance was expected."

Collins v. Life Ins. Co., 83 N. E., 542.

Shellenberger v. Ransom, 41 Neb., 641.

Owens v. Owens, 100 N. C., 240.

Carpenter's Estate, 170 Pa., 203.

138 From this principle it is clear, that if these infant children of McCue had killed their father instead of his killing their mother and getting hanged for it, thereby leaving them innocently without the support of either, then this policy made payable to his personal representatives, could have been collected and made to inure to their benefit.

(d) It goes without saying that under constitutional and statutory prohibition that no vested property rights of one dying at the hands of justice can be forfeited no matter how heinous his crime nor, for that reason, can the obligations of those who by ordinary contracts have dealt with him be avoided.

Therefore, if this insurance company had been a joint stock company instead of a mutual one and had contracted with McCue, for a valuable consideration, to deliver over to his personal representatives, say \$5,000 of its capital stock, the day after his death, no one would deny that it would have to comply with its contract.

But with great force it is argued that the question is no longer an open one in the Federal courts and, that, notwithstanding the decisions of courts of last resort in the states to the contrary, the Supreme Court of the United States in *Ritter v. Mutual Life Ins. Co.*, 169 U. S., 139, has held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he, in sound mind, intentionally took his own life; and this irrespective of the question whether there was a stipulation in the policy to that effect or not, and that the same court in *Burt v. Union Central Ins. Co.*, 187 U. S., 181, has decided the exact question in controversy here

to the effect that a policy of life insurance does not insure against the legal execution of the insured for crime. Touching the first case little need be said and it is cited only as illustrating how jealously this great court has adhered to and applied this doctrine of public policy to these insurance contracts. That its ruling is not in accord with those of the courts of last resort in many of the states we have already pointed out and in some of these states the contrary view has so impressed the legislative mind that special statutes, expressly nullifying the principle of this decision, have been enacted. In passing upon such a statute the Supreme Court, speaking
139 through the same learned justice who rendered the opinion in the Ritter case, says:

"That the statute is a legitimate exertion of power by the state cannot be successfully disputed. Indeed the contrary is not asserted in this case, although it is suggested that the statute 'seemingly encourages suicide, and offers a bounty therefor, payable, not out of the public funds of the State, but out of the funds of insurance companies.' There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy even in the absence of prohibitory statute, forbade a recovery upon a life policy, silent as to suicide where the insured, when in sound mind, wilfully and deliberately took his own life. Ritter v. Mutual L. Ins. Co., 169 U. S., 139.

"But the determination of the present case depends upon other considerations than those involved in the Ritter case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot, for that reason alone, be disregarded: for it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the constitution of the state or the constitution of the United States."

Whitfield v. Aetna Life Ins. Co., 205 U. S., 489.

By this decision it seems to us we reach bed-rock in this matter. It would seem very clear that touching general contracts of insurance, governed by the rules of commercial law, the Federal courts in obedience to the ruling in the Ritter case must hold, regardless of state decisions, that no recovery can be had on a policy of insurance on the life of one who wilfully and deliberately, while in sound mind, took his own life. And we must go a step further and say that in the case of such contracts general in character and governed by the rules of commercial law, we must, regardless of state
140 decisions, in view of the decision of the Supreme Court in the Burt case, hold that a policy of life insurance "does not insure against the legal execution of the insured for crime." But in special contracts not governed by the rules of commercial law, but provided for by special legislation of a state, conferring

special rights and vested interests enforceable alone under such state legislation, we must, under the ruling in the *Whitfield* case, be governed by the law of that state touching the application of this doctrine of public policy for, under such circumstances, the state has a right to adopt the view entertained by the Supreme Court or to reject it. In other words the state by its own legislation and the decisions of its own courts can establish its own public policy, "provided it does not, in doing so, come into conflict with the constitution of the state or the constitution of the United States," although such policy, so established, may be, in the opinion of the Federal courts, "inconsistent with public policy or sound morality."

"The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the constitution or laws of that state; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character, when established by repeated decisions." *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555.

That this position has from the beginning and uniformly since been held by the Supreme Court, cannot be more strikingly illustrated than by its decisions touching indefinite charitable bequests and devises. In 1819, Chief Justice Marshall rendered his opinion in *Baptist Association v. Hart*, 4 Wheat., 1, in which he held, such could not be established by a court of equity, independent of the statute, 43 Eliz. The case came from Virginia where the public sentiment was distinct and very bitter against these indefinite charities, especially to church organizations. Judge Story subsequently published a concurring opinion in this case, 3 Pet. (App.) 481 (497?). Subsequently he changed his mind and wrote the opinion in *Vidal v. Girard's Ex'r*, 3 How., 127, upholding such a bequest. (See also *Fontain v. Ravennel*, 17 How., 369.)

141 The Virginia public policy however, became firmly established in accord with the ruling in *Association v. Hart*, against the validity of such indefinite charities. See *Gallego's Ex'rs v. Attorney General*, 3 Leigh, 450. In consequence, in *Wheeler v. Smith*, 9 How., 55, and again in *Kain v. Giboney*, 101 U. S., 362, both Virginia cases, the case of *Association v. Hart* was followed and such indefinite charitable bequests were held void, solely because the rule of public policy in Virginia, as determined by the decisions of its courts, demanded it and this too notwithstanding the fact that it was clear that Chief Justice Marshall had been mistaken in saying that such charities in England could not be established by a court of equity independent of the statute of 43 Eliz., and the further fact that the Supreme Court in the *Girard* case and in other cases arising from other states where no such rule of public policy prevailed, had upheld such charities. In fact in *Russell v. Allen*, 107 U. S., 167, Mr. Justice Gray says:

"And the only cases in which this court has followed the decision in *Baptist Association v. Hart*, have, like it, arisen in the state of Virginia, by the decisions of whose higher court charities,

except in certain cases specified by statute, are not upheld to any greater extent than other trusts."

It would seem clear therefore, that the Supreme Court by this line of decisions, so uniformly upheld for so many years, notwithstanding we be in entire accord with it as to what constitutes the true principle of public policy based upon sound morals in the premises, has directed us if the state has, by its statutes or the decisions of its highest court, established a contrary rule not contrary to constitutional inhibition, to follow such rule in the enforcement of contracts arising under the laws of that state and not otherwise.

It therefore becomes important for us to determine first whether this insurance policy was a Wisconsin contract or simply a commercial one and, second, whether the rule of public policy in Wisconsin, if there be any, is contrary to that enunciated by the Supreme Court. As to the first:

The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that state, which distinctly defines its power and obligations. This Act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those "who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns * * * shall thereby become members thereof during the period they shall remain insured." It gives to them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and officers; to sue said corporation and to be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualification of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies. In addition to this the policy on its face shows it was executed at the office of the company in Wisconsin and by its express terms was made payable there. This being true, the conclusion is inevitable.

This contract must be held to be a Wisconsin one, to be construed according to its laws.

As to the second question: The Legislative act of Wisconsin gave to this company the unlimited power to "insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks."

"This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general be addressed to the Legislature. Questions of

policy determined there are concluded here." License Tax Cases, 5 Wall., 462, 469.

This legislative act did not limit the power to assume life risks but expressly gave power to assume all and every such. We would simply be indulging in judicial legislation for the state of Wisconsin if we should add to this act "except those arising from suicide or hanging." To have clothed this company with this power may have been inexpedient and unwise, but with that
 143 we can have no concern. Having been thus empowered to assume all and every risk the company was not thereby deprived of the power to limit its assumption by express stipulations in the contract, to those it was willing and desirous to assume. If it does not however, so limit its liability under such circumstances it must be held to have assumed the risks, under ruling of the supreme court of Wisconsin in *McCoy v. Northwestern Relief Association*, 92 Wis., 577. In this case the policy provided that death by suicide was not one of the risks assumed and would render the policy void. The charter and by-laws of the company did not exclude suicide as a risk however. The lower court held that by reason of the charter not so excluding death by suicide as a risk to be assumed the suicide clause in the policy was void and the company responsible notwithstanding. The supreme court reversed this ruling and held that the policy contract could provide such exception, although the charter and by-laws of the company did not. Marshall, J., in this case says:

"It is well settled that, if a contract for life insurance does not provide against liability in case of death by suicide or self destruction, then such cause of death does not constitute a defense."

Again in *Patterson v. National, &c., Ins. Co.*, 100 Wis., 118, the Supreme Court of Wisconsin, after direct consideration of the Boland case (upon which the ruling in the Burt case is based), and the Ritter case, says:

"Conceding the strength of the arguments upon public policy on which the Ritter case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in these decisions by the courts and by the people, that we ought to hold in accordance with those decisions, that, in case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect."

We are driven to the conclusion that the rule of public policy in Wisconsin as established by the Legislative act creating
 144 the defendant company and defining its rights and powers and by the decisions of its highest court is directly opposite to that established by the Supreme Court in the Ritter and Burt cases, and that in compliance with the direction of the Supreme Court as herein set forth in such case involving public policy, we must construe this Wisconsin contract in accord with its law and its supreme court's ruling.

It may be added incidentally that the case of *Collins v. Met.*

Life Ins. Co., relied on by defendant's counsel, as a case directly in point, decided by intermediate courts adverse to recovery in Pennsylvania (where the action was allowed to be dismissed without prejudice before final judgment however), and in Illinois, has by the Supreme Court of the latter state, all the judges concurring, been reversed and the company held liable. 83 N. E., 542.

With this view that, touching questions of public policy, the state laws and decisions must control, we find no conflict apparent with the decision in the Burt case. The question did not arise there. It seems in effect to have been conceded that the insurance contract was a commercial one to be construed by the rules of commercial law independent of state decision. This is shown by the contract itself, a copy of which is appended to the brief of the appellants. It was the ordinary non-participating one for \$5,000 in case of death and contracting to pay a fixed surrender value of \$2,194 upon maturity at the end of twenty years. The greater stress in the case was made upon the alleged right to show notwithstanding the judicial conviction, that the insured was unjustly convicted and executed; that he did not in fact commit the crime of murder or participate therein, or if he did he was at the time insane and irresponsible.

We do not discuss or determine whether under the circumstances the children and heirs at law or the executors are entitled to recover, the determination of this question having been expressly waived by counsel.

The judgment, or more properly decree, of the court below, must be reversed, the cause remanded and the defendant company held liable.

Reversed.

145 & 146 WADDILL, *District Judge*, dissenting:

I am unable to concur with the majority of the court in the view above expressed, believing as I do, that the case is controlled by the decision of the Supreme Court of the United States in *Burt vs. Union Central Insurance Co.*, 187 U. S., 362; and hence that the judgment of the lower court should be affirmed.

147 Nov. 7, 1908, (same term), the court made and entered the following judgment, to-wit:

Judgment.

Filed November 7, 1908.

United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM McCUE et al., Plaintiffs in Error,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al., Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, reversed, with costs, and the said cause is remanded to the said Circuit Court of the United States for the Western District of Virginia, at Lynchburg, with directions to set aside the verdict and grant a new trial, in accordance with the opinion of this court.

Nov. 7th, 1908.

J. C. PRITCHARD.

On another day, to-wit: November 11, 1908, the mandate of this court is on motion of the defendants in error stayed in open court for sixty days.

Petition for a Rehearing.

Presented Dec. 14, 1908.

148 United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and
Ruby G. McCue, Infants, by Marshall Dinwiddie, Their Next
Friend, et al., Plaintiffs in Error,

versus

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al., De-
fendants in Error.

In Error to the Circuit Court of the United States for the Western
District of Virginia, at Lynchburg.

To the Honorable Judges of the United States Circuit Court of
Appeals for the Fourth Circuit, Sitting at Richmond, Virginia:

The Northwestern Mutual Life Insurance Company, the Defendant
in Error in the above entitled cause, respectfully prays this
court for a rehearing of and an order setting aside its judgment
entered herein on the — day of November, 1908, and for a re-
consideration of the same.

In support of its petition it respectfully urges that the Court erred
in its reversal of the judgment of the Circuit Court in the following
particulars:

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First.

In holding that the contract of insurance was made in Wisconsin
and as such governed by the laws of that State instead of being a
contract made in the State of Virginia; and

Second.

In holding that it was not a contract to be construed by the
general commercial law of the country as enforced by the Federal
courts regardless of the State where it was made.

Counsel begs to assure the court that this petition is not prompted
by the amount involved but by the sincere belief that the Court
has reached a conclusion which, if allowed to stand, will establish
for this Circuit a rule different from that which prevails in the
other Circuits of the Union, and which will result in great confusion
in the construction of thousands of insurance policies, Life, Fire,
Marine and Accident, involving billions of dollars.

We allude to the finding of the Court that the insurance con-
tract in this case was made in Wisconsin and governed by the laws
of that State, and as such was not one for construction under the
general commercial law enforced by the Federal courts in cases of

insurance contracts. A finding, we repeat, which in operation means that countless policies of insurance outstanding in this country will be construed by the United States courts in accordance with the laws of the forty-eight States in which the several companies may have obtained their charter instead of by the single rule of the commercial law announced by the Supreme Court of the United States in an unbroken line of decisions.

Various insurance companies have for years sought to evade the laws of the States in which they may be doing business by a provision in the policy declaring that it is a contract to be construed by the law of the State where the company was chartered. But in spite of such a provision the Federal courts have uniformly held that such policies were contracts of the State where the application was made and the premium paid by and the policy delivered to the insured, and were to be construed by the general commercial law. In a word, the rule is that although the policy may contain a provision that it is to be considered as a contract of the home State and governed by the laws of such State, still such a provision will not prevail against the laws and policy of the State where the contract is actually made by the payment of the premium and the delivery of the policy.

All other questions involved in this suit become of minor importance as compared with this far-reaching one. The opinion of the Court, at pages 9 and 10, concedes that if the general commercial law applies then, under the case of

Burt vs. Union Central Life Insurance Company, 187 U. S., 362,

the judgment of the Circuit Court is correct and cannot be disturbed. This, therefore, is stated by the Court to be the crucial question.

At page 11 of its printed opinion, the Court says:

"It therefore becomes important for us to determine first whether this insurance policy was a Wisconsin contract or simply a commercial one, and, second, whether the rule of public policy in Wisconsin, if there be any, is contrary to that enunciated by the Supreme Court."

It then proceeds to hold it to be a contract not enforceable under the general commercial law, but a special Wisconsin contract enforceable according to the laws of that State. It cites, however, no authority for this conclusion, but its reasons are stated at pages 11 and 12 as follows:

"The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that State, which distinctly defines its power and obligations. This act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those 'who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns * * * shall thereby become members thereof during the period they shall remain insured. It gives to them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and offi-

cers; to sue said corporation and to be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualifications of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies. In addition to this the policy on its face shows it was executed at the office of the company in Wisconsin and by its express terms was made payable there. This being true, the conclusion is inevitable.

This contract must be held to be a Wisconsin one, to be construed according to its laws.

It will be observed that the Court does not state where the application was made nor where the first premium was paid, nor where the policy was delivered, nor does it make any allusion to the express provision of the policy that it should not become a contract until the first premium was actually paid by the insured. Yet these several acts have been expressly held by the Supreme Court of the United States as fixing conclusively the place where the contract was made.

Mutual Life Insurance Company v. Hill, 193 U. S., 55.

Justice Brewer, in delivering the opinion of an unanimous court, in stating the several propositions which had been established by prior decisions of that Court in regard to the construction of life insurance policies, laid down the following rule, namely:

152 "The State where the application is made, the first premium paid by and the policy delivered to the assured, is the place of contract,"

citing

Equitable Life Assurance Society v. Clements, 140 U. S., 226,
Mutual Life Insurance Company of New York v. Cohen, 179
U. S., 262.

It is therefore confidently urged that:

The policy was a Virginia contract, because the application was made, the premium paid, and the policy delivered there.

The agreed facts in this case, page 31, show that the application was made by McCue at Charlottesville, Virginia, February 25th, 1904, and that the policy was delivered to him at Charlottesville, Virginia, on March 15th, 1904, when he gave his note for the premium, which note was payable at said City of Charlottesville, in Virginia, and actually paid there by the checks of McCue given in the said City September 14th and 15th, 1904. See pages 114, 115 and 116 of the printed record.

The above facts having been agreed make it a concession in this case.

In addition to this, the policy itself provided as follows:

"This policy shall not take effect until the first premium shall have been actually paid."

It so happens that this very provision of the policy of this defendant company has been construed by one of the Circuit Courts of the United States. We allude to the case of

Northwestern Mutual Life Insurance Co. v. Elliott, 5 Fed., 225,

wherein the court, holding the policy to be an Oregon and not a Wisconsin contract, says as follows:

"Where then was this contract made: in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract binding upon the parties.

153 "The premium was paid to the agent of the plaintiff at Portland (Oregon), who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And, until it was binding upon the company, it was not binding on the applicant; in short it was not yet a contract, but only a proposition."

In a word, the policy and charter involved in this case differ in no legal or essential features from those in Ritter's case, 169 U. S., 139, and Burt's case above cited.

In the policy of the Union Central Life Insurance Company, issued to the assured in Burt's case, and found as an appendix at page 85 of the brief for the plaintiffs in error is the following provision:

"This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page thereof which are made a part of this contract, which contract shall be held and construed to have been made in the City of Cincinnati, Ohio."

In spite of this express provision declaring the contract to be an Ohio contract, the Supreme Court in deciding the case applies the rule of the general commercial law, and not that of Ohio.

We therefore with confidence urge upon the court a consideration of the first point made by us; namely that it is a Virginia contract and not a Wisconsin contract, and is to be construed by the general commercial law of the land as laid down by the Supreme Court of the United States in Burt's case, and others, regardless of the fact that it is a Virginia contract.

It needs no argument to establish the principle that a policy of insurance is a contract, whether it be Fire, Life, Marine, Accident or Personal Liability, and therefore is in all respects and all its phases to be treated and construed as any other contract. The following authorities so hold:

154 "Life insurance imports a mutual agreement. * * *"
Ritter v. Mutual Life Ins. Co., 169 U. S., 130.

"The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse

in which there is no difference whatever between insurance against first, insurance against the perils of the sea, or insurance of life."

New York Life Insurance Co. v. Cravens, 178 U. S., 389.

St. Johns v. the Amer. Mut. Life Ins. Co., 13 N. Y., 31-38.

Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed., 721-2.

It is a general rule that all contracts are made where the last acts are performed to make them binding. The reasons above quoted given by the court for its conclusion that the contract here was a Wisconsin contract do not mention those final acts, also above cited, which are necessary to make the contract between McCue and the Northwestern Mutual Life Insurance Company a binding contract. On the contrary, the Court bases its conclusion on the following:

A. The defendant is a Wisconsin corporation;

B. Being a mutual company, its members acquire certain rights not enumerated in the policy;

C. Policy shows on its face that it was executed in Wisconsin;

D. By express terms made payable in Wisconsin.

The provisions of this policy thus referred to by the Court are identically the same in most instances and substantially such in all respects as those contained in the ordinary life policies of the mutual companies of all the States. The charter of the Northwestern Mutual Life Insurance Company and its policy in this case differ in no legal essentials from that of the Mutual Life Insurance Company of New York, which was involved in Ritter's case, 169 U. S., 151, and that of the Union Central Insurance Company in Burt's case, 187 U. S., 362.

155 Reference to the charter of the Mutual Life in the Ritter case, (see also charter of Mutual Life Insurance Company in "Charters of American Life Insurance Companies," published by the Spectator Company of New York, edition of 1906, page 174, etc.), shows that its provisions are identical with those of the Northwestern Mutual. Indeed the latter was manifestly taken literally from the former. This is not surprising since the Mutual Life was chartered in 1842 and is regarded as the parent Mutual Life Company in this country, while the Northwestern was only chartered in 1857. The provisions in the charter of the Northwestern Mutual quoted and relied on in the opinion of the Court, p. 11-12, is taken literally from that of the Mutual Life as follows:

Charter of Northwestern Mutual.

SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess and convey shall:

Charter of Mutual Life Insurance Company of New York.

SECTION 2. * * * The corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities.

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be:

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business.

2nd. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted, or for money due.

3rd. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case, or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company, and the convenient transaction of its business, shall be sold and disposed of within six years after the said company shall have acquired title to the same.

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer.

SECTION 5. All the corporate powers of the said Board of Trustees, and such officers and agents as they may appoint. The Board of Trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of the corporation, and they shall have power to declare by By-Laws, what number of Trustees less than a majority of the whole, but not less than nine shall be a quorum for the transaction of business, and nine shall be such quorum, until otherwise provided by By-Laws. The Trustees shall also have power to make all such By-Laws as shall be needful or proper to the due exercise of the powers hereby granted.

SECTION 6. The persons named in this Act shall constitute the first Board of Trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each; the term of the first class shall expire at the end of one year; the term of the second class shall expire at the end of two years; the term of the third class shall expire at the end of three years;

1. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business; or,

2. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted, or for moneys due, or,

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or,

4. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporations shall not purchase, hold or convey real estate in any other case, or for any other purpose, and all such real estate as shall not be necessary for the accommodation of the said company in the convenient transaction of its business, shall be sold and disposed of within six years after the said company shall have required title to the same, and it shall not be lawful for the said company to hold such real estate for a longer period than that above mentioned.

SECTION 3. (Members).—All persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in the said corporation, as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation, and no longer.

SECTION 4. (Powers of Board).—All the corporate powers of the said company shall be exercised by a board of trustees, and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of this corporation, and they shall have power to declare by by-law what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business.

SECTION 5. (First Board of Trustees).—The persons named in the first section of this act shall constitute the first board of trustees.

SECTION 6. (Trustees Divided Into Classes).—The trustees shall, at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at

the term of the fourth class shall expire at the end of the fourth year, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice—but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The Board of Trustees may fill any vacancies in their number occasioned by death, resignation or by removal from the State. The election of trustees shall be held on the first Monday of June, in each and every year, at such place in the city of Janesville as the Board of Trustees shall designate, of which they shall give at least four weeks' previous notice in two of the public newspapers printed in Milwaukee, Madison and Janesville, and the Board of Trustees at the same time shall appoint three of the members of the said corporation Inspectors to preside at such election, and if any of said Inspectors decline or fail to attend, the trustees shall appoint others to fill such vacancies.

SECTION 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the Trustees, and no premium so paid shall ever be withdrawn from said Company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this Company during the continuance of its charter.

SECTION 8. The Trustees shall determine the rates of Insurance and the sums to be insured.

SECTION 9. It shall be lawful for said corporation to invest the said premiums in the securities designated in the two following sections, and to sell, transfer and change the same, and re-invest the funds of said corporation when the trustees shall deem expedient.

SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages, or unincumbered real estate within this State. The real estate or other property to secure such investment of

the end of one year; the term of the second class shall expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of four years, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of votes constituting a choice; but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number occasioned by death, resignation, or removal from the State. The election of trustees shall be held on the first Monday of June in each year, at such place in the city of New York as the board of trustees shall designate, of which they shall give at least fourteen days' previous notice in two of the public newspapers printed in the said city; and the board of trustees shall at the same time appoint three members of the said corporation inspectors to preside at such election; and if any of the said inspectors decline or fail to attend, the trustees may appoint others to fill such vacancies.

SECTION 7. (Members Must Pay Their Premiums).—Every person who shall become a member of this corporation by effecting insurance therein, shall, the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees; and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter.

SECTION 8. (Premiums).—The trustees may determine the rates of insurance, and the sum to be insured.

SECTION 9. (Funds).—It shall be lawful for the said corporation to invest the said premiums in the securities designated in the two following sections, and to sell, transfer and change the same, and reinvest the funds of said corporation when the trustees shall deem expedient.

SECTION 10. (Investments in Real Estate).—The whole of the premium received for insurance by said cor-

capital, shall in every case, be worth twice the amount loaned thereon.

SECTION 11. The trustees shall have power to invest a certain portion of the premiums received not to exceed one-half thereof in public stocks of the United States, or of this State, or of any incorporated city of this State.

SECTION 12. Suits at law may be maintained by said corporation against any of its members for any cause relating to the business of said corporation. Suits at law may also be prosecuted and maintained by any member against said corporation, for loss by death if payment is withheld more than three months after the Company is duly notified of such

losses, and no member of the corporation shall be debarred his testimony as a witness in any such cause on account of interest in such suit, or of his being a member of said company, and no member of the corporation not being in his individual capacity, a party to such suit, shall be incompetent as a witness in any such suit on account of his being a member of said company.

SECTION 13. The officers of said Company, at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of said Company, and in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; any member who would be entitled to share in the profits, who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the Company. No member except officers of the Com-

pany, and agents thereof, shall be personally liable for the losses of the Company, and such officers and agents, severally, shall be liable but only for the losses arising by reason of their own respective neglect or misconduct.

poration, except as provided for in the following sections, shall be invested in bonds and mortgages on unincumbered real estate within the State of New York; the real property to secure such investment of capital shall, in every case, be worth twice the amount loaned thereon.

SECTION 11. (Investments in Stocks)

—The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States or of this State, or of any incorporated city in this State.

SECTION 12. (Company May Sue and Be Sued)—Suits at law may be maintained by said corporation against any of its members for any cause relating to the business of said corporation; also suits at law may be prosecuted and maintained by any member against said corporation for losses by death, if payment is withheld more than three months after the company is duly notified of such losses; and no member of the corporation shall be debarred his testimony as witness in any such cause on account of his being a member of said company; and no member of the corporation, not being in his individual capacity a party to such suit, shall be incompetent as a witness in any such cause on account of his being a member of said company.

SECTION 13. (Members to Share in Profits)—The officers of said company, at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of the said company. And in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion which shall be found to belong to him at the next striking of balance, shall be paid when the same shall be ascertained and declared. Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any

periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company; and all such previous payments made by him shall go to the benefit of the company. No member, except officers and agents thereof, shall be personally liable for the losses of the company; and such officers and agents severally shall only be liable for the losses arising by reason of their own respective neglect or misconduct. (As Amended by laws of 1851, chapter 60).

Parts in heavy type indicate the material differences existing between the charters of the Mutual Life Insurance Company and that of the defendant in error from which it will be seen that persons insuring in this defendant company do not acquire by virtue of its charter any rights different from those insuring in the Mutual Life Insurance Company as was the case with the assured in *Cohen v. Mutual Life Insurance Co.*, 179 U. S., 264, where the application was specifically made subject to the charter of that company.

Every corporation chartered by any State is a citizen of that State, but we submit there is no rule of law which holds that when a corporation, for instance of California, completes a contract in Maine it is a California contract simply because one of the parties to it is a citizen of California. The Northwestern Mutual Life Insurance Company, one of the parties to this contract, is a citizen of Wisconsin. McCue, the other party to the contract, was a citizen of Virginia. The reasoning of the Court, we think, is erroneous in selecting the domicile of the Insurance Company rather than that of McCue as determining where the contract was made. It may be, as the Court says, that McCue obtained certain rights not mentioned in the policy, but is this not equally true of every person dealing with a corporation? In this respect it in no wise differs from the insured in *Ritters* case, which involved a mutual company. This,

we submit, cannot make a contract finally made by a corporation in a State other than its domicile, a contract of its home State. If this is not true, then a Virginia corporation could embody in its charter or by-laws a provision to the effect that "All contracts entered into by this corporation, where-soever they may be finally completed, shall be Virginia contracts," and thus in disregard of the law of the State where the contract is made and it is doing business, carry with it the laws of its own home State and force the same upon the citizens of the State where it is permitted as a foreign corporation to do business. Certainly the Court could not have considered such a consequence in reaching its conclusion.

We respectfully suggest that further argument on this point to show that this was a Virginia contract and not a Wisconsin contract is not necessary, in view of the express ruling of the Supreme Court of the United States in

Mutual Life Ins. Co. v. Hill, 193 U. S., 551.

The policy in that case was issued by a mutual life insurance company in behalf of George D. Hill, at Seattle, in the State of Washington, upon a written application made by him in that State and sent to the home office of the company, was accepted by the company and a policy signed by it in its home office in the State of New York, and forwarded to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. In that case the children of the decedent were the beneficiaries, and the money was made payable in the event of death at the home office of the company in New York. The very same facts or conditions existed in that case as are mentioned in the Court's opinion as existing in this; namely:

A. The defendant company was a New York corporation, "owing its life to a special Act of the Legislature of that State."

B. It was a mutual company of which the insured, by the Act of Insurance, became a member entitled to rights and privileges not enumerated in the policy.

162 C. The policy on its face showed that it was executed at the office of the company in New York.

D. By its express terms — was made payable in the City and State of New York.

The parallelism between the case at bar and Hill's case being absolutely perfect in all legal essentials, except that in Hill's case there was an express provision in the policy that "The contract of insurance when made shall be held and considered at all times and places to have been made in the City of New York." There is no such provision in the policy in this case. Yet, notwithstanding such a provision in the Hill case, the court held that the policy was made at Seattle, in the State of Washington, and was therefore a Washington contract. The case at bar is therefore very much stronger, because had there been in McCue's policy a provision that it was a contract made in Wisconsin to be controlled by the laws of Wisconsin, and had there been among the laws of that State one expressly allowing a recovery in the event that McCue should die on the gallows for murder, that law being contrary to the public policy as announced in Burt's case, and, as we will presently see, in the State of Virginia, it could not, under the ruling in the Hill case, be held to be a Wisconsin contract and a recovery allowed under it.

It must be manifest, therefore, to the Court, upon a careful reading of this case, and Clements' and Cohen's cases cited by Justice Brewer, that the reasons assigned by it for making the McCue policy a Wisconsin contract are not sufficient, and therefore a rehearing should be granted and its judgment reconsidered.

Many decisions, both State and Federal, appropriate in support of the point being discussed could be cited and quotations made. We, however, refer the Court to only a few, as follows:

Mutual Life v. Cohen, 179 U. S. 264,

where Justice Brewer says, at page 264:

163 "The insurance policy contained a stipulation that it should not be binding until the first premium had been paid

and the policy delivered. The premium was paid and the policy delivered in the State of Montana (The Mutual Life is a N. Y. Corp.). *Under those circumstances, under the general rule, the contract was a Montana contract and governed by the laws of that State.* Equitable Life Assurance Society v. Clements, 140 U. S. 226, 232. (Italics ours)."

In Hicks vs. National Life Ins. Co., 60 Fed. 690,

the insurance company was a Vermont corporation, the insured was a citizen of New Jersey, the premiums were paid in New York. Judge Wallace, in speaking for the Circuit Court of Appeals, says:

"If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premium paid there, is a New York contract, *notwithstanding it is signed and issued by the insurer in another State*, the reference is supplied by the case of Assurance Soc. vs. Clements, 140 U. S. 226. 11 Sup. Ct. 822." (Italics ours).

25 Cyc., p. 748, says:

"The State where the policy is finally delivered by the agent of the company to the assured who there pays the premiums, delivery and payment of premium being essential to the final execution and taking effect of the contract, is the State in which the contract is made and by the laws of which it is to be construed, in the absence of any special provision to the contrary."

There is no provision to the contrary in this case.

In Minor on the Conflict of Laws,

the author at p. 399, speaking of the locus celebrationis of an insurance policy, says:

"Again, the payment of the first premium is often by the terms of the agreement, made the event upon which the policy is to become binding. In such case, the place where the premium is paid is the locus celebrationis of the insurance contract."

The same principle has been cited and followed in the following cases:

Cravins v. N. Y. Life Ins. Co., 148 Mo., 600, 71 Am. St. Rep. 637, 50 S. W. 519,

Wall v. Equitable Life Assur. Soc., 32 Fed. 283, (opinion by Justice Brewer, now of the Supreme Court),

Mutual, Etc., Co., — Robinson, 54 Fed. 580.

Equitable Life Ins. Co. v. Winning, 58 Fed. 541.

McMaster v. N. Y., etc., Co., 78 Fed. 33, 37.

Holmes v. Charter Oak Life Ins. Co., 131 Mass. 64,

Assurance Society v. Clements, 140 U. S. 226.

This brings us to the second point, namely, that the Court erred

In holding that it was not a contract to be construed by the general commercial law of the country as enforced by the Federal Courts regardless of the State where it was made.

We have partially discussed this point already because it was necessarily involved in some of the cases referred to in support of the first proposition.

On all questions of general commercial law, such as contracts and especially insurance contracts, the Federal courts follow their own rules. This has been the unvarying interpretation of the Federal Judiciary Act from its enactment, and it is nowhere better expressed than by Justice Story in

Swift v. Tyson, 16 Peters, 18, where he says:

“But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this
165 court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides ‘that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.’ In order to maintain the argument, it is essential, therefore, to hold that the word ‘laws’, in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. * * * Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.”

The same ruling is followed in:

Oates v. First Nat. Bank, 100 U. S., 239, 246.

Railroad Co. v. Lockwood, 17 Wall. 357,

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 126.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67.

Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, 106.

It only remains, therefore, to enquire whether the construction of a policy of insurance is a contract coming within the general
166 commercial law. And here again we find no confusion or contrariety in the decisions of the Supreme Court, but a unanimous line of authorities.

In Carpenter v. The Providence Ins. Co., 16 Pet. 495, Justice Story says, at Page 511:

“The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the

decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 106 Fed. 116-7, Affirmed in 179 U. S. 1. Chief Justice Fuller says, at Page 14:

"It is said that a different rule has been laid down in *Massachusetts* by the Supreme Judicial Court of that Commonwealth (*Kettell vs. Alliance Ins. Co.*, 10 Gray, 144. *Mayo vs. India Mut. Ins. Co.*, 152 Mass. 172).

Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. *The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the State decision as in matters of purely local law.*" (Italics our).

167 The Barnstable, 181 U. S. 464, 470:

"As the construction of a policy of insurance is one of general rather than one of local law (*Liverpool and Great Western Steam. Co. vs. Phoenix Ins. Co.*, 129 U. S. 397, 443; *Gloucester Ins. Co. vs. Younger*, 2 Curt 322), we are constrained to adopt our own views as to such construction, though the Courts of the State in which the cause of action arose have adopted a different law." (Italics ours).

It follows, therefore, from what has been said, that this contract and questions arising under it ought to be construed by this court under the general commercial law, which being true, the law of Wisconsin is in no way controlling upon this court, even if it should hold that the contract of insurance is a Wisconsin contract—a proposition which to our minds is untenable in view of the express declaration of Chief Justice Fuller in *Washburn & Moen Manufacturing Co. v. Reliance Insurance Co.*, *supra*.

It is now axiomatic in the law that an insurance company chartered by one State cannot do business in another except with the permission of the latter and subject to the terms, conditions and laws of the State in which it may so seek to do business. When the Northwestern Mutual Life Insurance Company came to Virginia and took McCue's application, received his first premium and delivered to him the policy in this suit, it became bound by the insurance laws and the public policy of Virginia as fully as if it had been incorporated by it. More than this, for the purposes of its Virginia business, it ceased to be subject to the Wisconsin laws in conflict with those of Virginia.

McCue's policy could not be a special Wisconsin contract to be

construed by any law or policy of that State inconsistent with those of Virginia and the general commercial law.

"That Missouri could forbid life insurance companies of other States from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted in view of the decisions of this court."

168 Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U. S., 225:

The court, after holding that the contract is a Wisconsin contract, declined to interpret it under the general commercial law, but instead followed a Wisconsin case, which, as it said, established a rule of public policy conclusive of this contract. The act incorporating the defendant company the court says at page 12 of the printed opinion, "did not limit the power to assume life risks, but expressly gave power to assume all and every such. We would simply be indulging in judicial legislation for the State of Wisconsin if we should add to this act except those arising from suicide or hanging."

If this last statement be true, then the Supreme Court of the United States has indulged in judicial legislation in the Ritter case and in the Burt case.

To assume "all risks" means all insurable risks, and the reason that death by hanging is not excluded in the same part of the policy which prohibits the insured engaging in hazardous enterprises, is because the latter are insurable risks in no way *contra bonos mores* while the former is an uninsurable risk, one which even if written in the policy would not allow a recovery, since it has been declared by the House of Lords and the Supreme Court to be violative of good conscience and sound public policy.

All corporations have by their charter the express or implied power to enter into any and all contracts in connection with their business, but this does not mean that they may enter into *ultra vires* contracts or those illegal *per se* or those *contra bonos mores*, nor does it mean that if they enter into such contracts that they will be upheld. So the right to assume all insurance risks does not mean to assume an illegal risk.

The court quoting from Section 3 of the charter of the Northwestern Mutual Life:

"The corporation hereby created shall have the power to insure the lives of its respective members and to make all and every risk appertaining to or connected with life risks and to grant and purchase annuities."

169 concludes therefore that it has the power to insure against death by hanging and death by suicide. This provision is almost identical with that contained in the charters of all of the large insurance companies operating in the United States.

See "Charters of American Life Insurance Companies," *supra*.

The charter provision of the Mutual Life gives that company:

"The power to insure their respective lives and to make all and every insurance appertaining to or connected with life risks and to grant and purchase annuities."

The charter of the Equitable Life Insurance Society of the United States that its business:

"Shall be to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith."

The charter of the Life Insurance Company of Virginia, granted by the Legislature of that State, states that its purpose is to carry: "On the business of insurance on lives and to make all and every insurance appertaining thereto or connected therewith."

The charter of the Maryland Life Insurance Company, granted by the Legislature of that State enacts:

"That the business of the said corporation shall be to make insurance on the lives of individuals and accidents by travel and every insurance appertaining thereto or connected with such risk and to grant, purchase or dispose of annuities."

The charter of the New York Life Insurance Company granted it by the Legislature of that State says:

"The business of the company shall be insurance on lives and all and every insurance pertaining to life."

170 These quotations show clearly that the charters of other insurance companies, both stock and mutual, which have been passed upon by state courts, by the circuit courts and the Supreme Courts contain provisions almost identical with that of this defendant company and therefore there is nothing peculiar in the charter of this company which gives the insured any rights or privileges different from that of the policy holder in any of the other insurance companies above named. In none of the cases against the Mutual, Equitable Life and others whose charters are above quoted has it been held that the power to insure lives and to make all and every insurance appertaining to or connected with life risks, includes the power to insure against death in violation of law, or death upon the gallows.

In order for this to have been one of the assumed risks, it must have been in the minds of the parties at the time the contract was entered into, for conditions arising after the contract is entered into cannot be considered as in the minds of the parties when the contract was made. The plaintiffs in error themselves have never contended that the risk of death by hanging was contemplated by the parties when this contract was made. See their brief, page 14:

"Certain it is that death by hanging (that is, the very risk this court has said the defendant company insured McCue against) was not actually in the minds of either party when the policy was issued."

If it was not in their minds when the contract was made, then there was no contract covering it and surely there can be no recovery when there is no contract on which to base it.

We shall not burden this petition by distinguishing the cases cited by the plaintiffs in error at pages 18 and 20 of their brief, to sustain the position that this is a Wisconsin contract. The court on reading those cases will see that they are clearly of a different character from *Equitable Life v. Clements* and the other cases cited by us. Take for example, the case of *Equitable Life v. Nixon*, 81 Fed. 799, which

followed *Equitable Life v. Trimble*. In the former case the court says:

171 "There is nothing to the contrary in the case of *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, so much relied on by the plaintiff in error. In that case it appeared that the first premium was not paid by the assured until the delivery of the policy to him in the State of Missouri, and no other acceptance of his application for insurance by the company was made to appear. * * * The contract involved in the present case was made when the application and the applicant's money were accepted by the insurance company, not before nor after. It then became a completed contract, binding both parties to it."

In the *Clements* case the last act was done in Missouri, the residence of the insured; in the *Nixon* case the last act was done in New York, the residence of the insurer.

These, together with the other cases cited, sustain the general proposition that an insurance contract is a contract of the State where the last act was done to make it binding, but it so happened in those particular cases that the last act was done in the State of the insurance company's residence, rather than in the State where the insured lived.

What we have said makes it unnecessary to discuss the supposed public policy of Wisconsin, because under the rule laid down in *Mutual Life v. Hill*, had there been in that State a statute declaring that in the event that McCue should die on the gallows, that this defendant company could not set it up as a defense, that statute would have been inoperative upon a contract made in a State where the public policy was in conflict with it, as is the case in Virginia. The rule in Virginia is laid down by a unanimous court in the case of *Plunkett v. Heptasophs*, 105 Va. 643 where in affirming the opinion of the Circuit Court which denied a recovery in the case of a suicide, Keith P., after quoting from Burt's case, Ritter's case and Fauntleroy's case, says:

"We think the authorities cited fully vindicate the opinion and judgment of the Circuit Court and it is affirmed."

172 We must, however, respectfully differ with the Court in the construction placed by it upon the case of *Patterson v. National, etc., Insurance Co.*, 100 Wisconsin, 118, 42 L. R. A. 253, which case the Court states establishes the public policy for Wisconsin. The Wisconsin Court there says:

"Nor would the application of that principle to this case necessarily conflict with the Ritter case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured."

This to our mind shows that the Wisconsin Court recognizes a clear distinction between that class of cases where the policy is made payable to a third party who has acquired some valuable interest therein, and cases like the Ritter case and the present case where it

is payable to the estate of the assured. Indeed the Court says that its decision does not conflict with that in the Ritter case. This distinction is stated by the Court when it declines to say what the law would be in a case like the present one.

"Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us."

We submit, therefore, that the Wisconsin Court having expressly declined to pass upon a case like the present, its ruling upon a case with dissimilar facts cannot establish a rule of public policy for Wisconsin controlling upon the Court in this case.

We submit that the court erred in holding that the cases of *Patterson v. Life Insurance Company*, 100 Wisconsin, and *McCoy v. Northwestern Relief Association*, 92 Wisconsin, 577, 66 Northwestern, 697, which were cases of suicide, are in any way analogous to cases involving death in consequence of crime, for the reason that in Wisconsin suicide is not a crime and the court in the opinion in the *Patterson* case laid special stress upon that fact. Consequently, one who committed suicide did not violate the law of Wisconsin and therefore there was no question of the public policy of that State involved in the decision in the *Patterson* case.

In the court's reference to *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489 (page 9 printed opinion) it says:

"By this decision it seems to us we reach bed-rock in this matter."

173 Again, we submit that this case is in no way contrary to the rule laid down in *Equitable Life v. Clements*, supra, and the other cases following it. On the contrary, it is in all respects a confirmation of the views expressed in that case and in the case of *Hill v. The Mutual Life Insurance Co.*, 193 U. S. 551. The defendant in error, a Connecticut corporation, issued its accident policy upon the life of James Whitfield, a resident of Missouri. There was a Missouri statute which declared that insurance companies doing business in that State could not make the defense that the insured committed suicide, while the policy contained a provision that in the event of suicide the insured should recover one-tenth of the principal amount. In order to give effect to this Missouri statute it was necessary for the Court to reach the same conclusion that was reached in the *Hill* case, namely, that the contract of insurance was a Missouri contract and that the statute of Missouri prevailed over any provision contained in the policy, and the reason that the contract was a Missouri contract is the same as that stated in *Equitable Life v. Clements*, namely, the premium was paid and the policy delivered in the State of Missouri. For statement of facts see 144 Fed., 356. If there is any analogy between the *Whitfield* case and the present case it would simply result in compelling this Court to follow any statute of Virginia which would bear upon the right of recovery in this case, and in Virginia there is no such statute. In view of the *Whitfield* case, it cannot be denied that a State may adopt a public policy applicable to foreign insurance

companies doing business in it, but the Court in its opinion has overlooked the all-important fact that the public policy applied in that case was not the public policy of Connecticut, the home of the insurance company, but the public policy of Missouri, in which State the contract of insurance was consummated, and where the insured resided. Applying this case to that at bar, it follows that McCue's policy having been paid for and delivered in Virginia was a Virginia contract and the statutes of Virginia, and not those of Wisconsin, controlled it.

174

Conclusion.

In conclusion, we respectfully submit that a careful study of *Equitable Society v. Clements*, 140 U. S., p. 226; *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139; *Burt v. Union Central Insurance Co.*, 187 U. S. 362; *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, will amply sustain the views taken by us in this petition and justify the propriety of a rehearing being granted in this case.

Respectfully submitted,

WM. H. WHITE,
WM. H. WHITE, JR.

The undersigned, counsel practicing in the United States Circuit Court of Appeals, does certify that, in his opinion, a rehearing should be granted in this case.

175

Order Denying Rehearing.

Filed May 17, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM McCUE et al., Plaintiffs in Error,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al., Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

This court having at its November Term, 1908, rendered its decision reversing the judgment of the said Circuit Court in this cause, and the defendants in error, by their attorneys, having on the 14th day of December, 1908, presented to the court a petition for a rehearing of the cause, and the same having been carefully considered,

It is now here ordered by this court, that the rehearing asked for, be, and the same is hereby denied.

J. C. PRITCHARD,
Circuit Judge Presiding.

May 17th, 1909.

Order Staying Mandate.

Filed May 19, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 739.

J. WILLIAM MCCUE et al., Plaintiffs in Error.

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY et al., Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Virginia.

Upon the application of the defendants in error, by counsel, and for good cause shown, it is ordered, that the mandate of 176 this court in the above entitled cause be and the same is hereby stayed pending defendants in error's application to the Supreme Court of the United States for a writ of certiorari, provided the said application is presented to the said Supreme Court on or before October 5, 1909.

J. C. PRITCHARD,
Circuit Judge Presiding.

May 19, 1909.

*Clerk's Certificate.*UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 15th day of September, A. D., 1909.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

177 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 19th day of October 1909, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the transcript already filed in the Clerk's Office of the Supreme Court of the United States with the petition for a writ of certiorari be taken as a return to said writ.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 29th day of October, A. D. 1909.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

C. M. D.

178 In the United States Circuit Court of Appeals for the Fourth Circuit.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Petitioner,
vs.

J. WILLIAM McCUE et als., Respondent.

It is hereby stipulated that the transcript already filed in the Clerk's Office of the Supreme Court of the United States with the petition for a writ of certiorari be taken as a return to said writ, dated the 19th day of October, 1909.

WM. H. WHITE,

WILLIAM H. WHITE, JR.,

Counsel for Northwestern Mutual Life Insurance Co.

HARMON & WALSH,

Counsel for J. Wm. McCue et als.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed October 29, 1909, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 29th day of October, A. D. 1909.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

C. M. D.

179 UNITED STATES OF AMERICA, *vs.*:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which J. William McCue, Samuel O. McCue, Harry M. McCue, and Ruby G. McCue, Infants, by Marshall Dinwiddie, their next friend, et al., are plaintiffs in error, and Northwestern Mutual Life Insurance Company et al. are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
180 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and nine.

JAMES W. MCKENNEY,

Clerk of the Supreme Court of the United States.

181 [Endorsed:] File No. 21841. Supreme Court of the United States. No. 615, October Term, 1909. Northwestern Mutual Life Insurance Company vs. J. William McCue et al., Infants, by Marshall Dinwiddie, their next friend, et al. Office of the Clerk, received Oct. 30, 1909, Supreme Court U. S. Writ of Certiorari. The Execution of the within writ appears from the schedules hereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Court of Appeals.

182 [Endorsed:] File No. 21841. Supreme Court U. S. October Term, 1909. Term No. 615. Northwestern Mutual Life Insurance Company, petitioner, vs. J. William McCue et al., infants, by Marshall Dinwiddie, their next friend, et al. Writ of certiorari and return. Filed October 30, 1909.



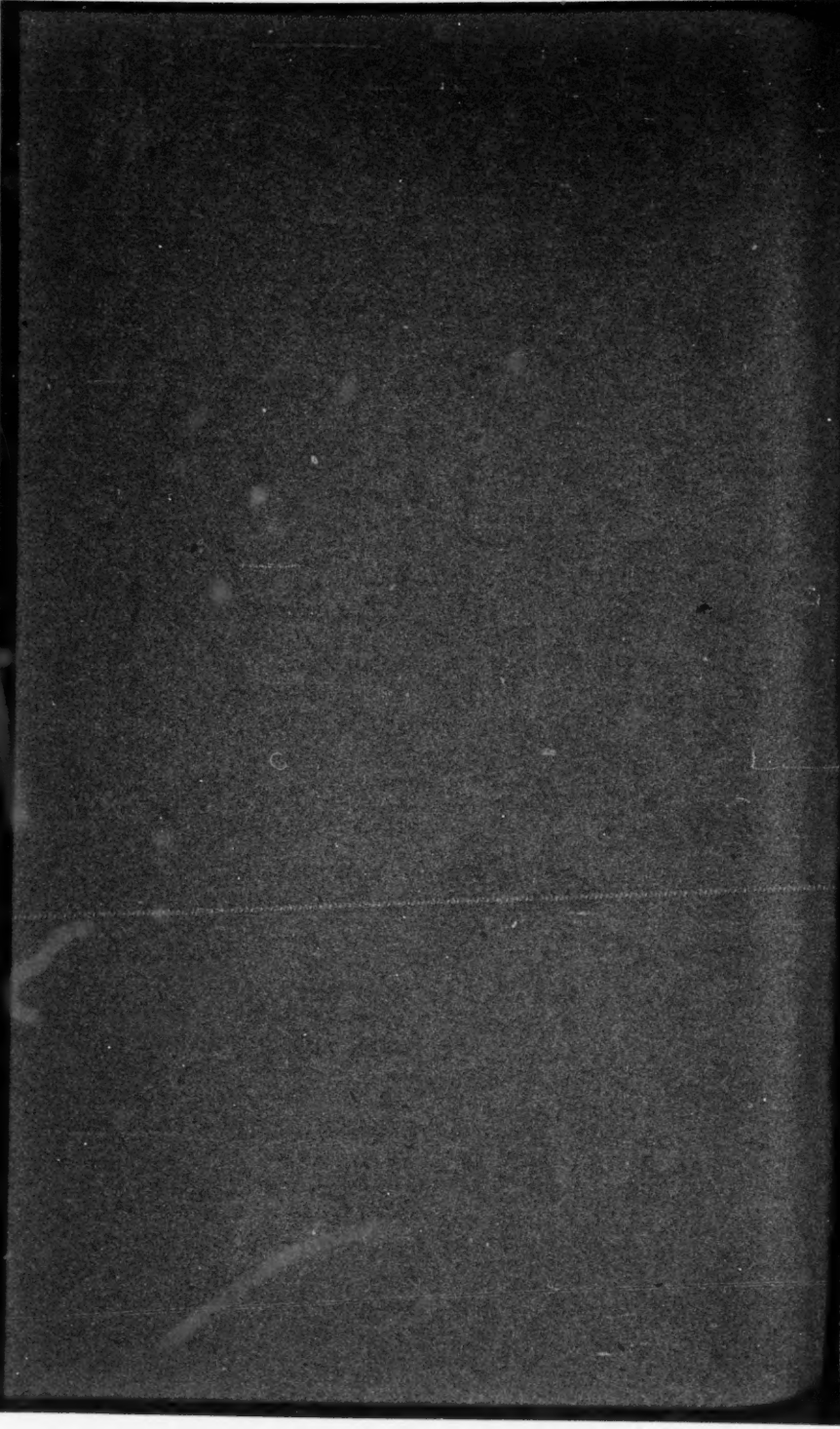
Supreme Court of the State of New York

OFFICE OF THE CLERK

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

1. WILLIAM JACOB BARTON, G. ARTHUR BARTON,
BARTON and BARTON, Agents for Insurance
Insurance Company of New York

2. JAMES W. BARTON, G. ARTHUR BARTON,
BARTON and BARTON, Agents for Insurance
Insurance Company of New York



The Supreme Court of the United States,

OCTOBER TERM, 1909.

NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,
Petitioner,

vs.

J. WILLIAM McCUE, SAMUEL O.
McCUE, HARRY M. McCUE and
RUBY G. McCUE, infants, by MAR-
SHALL DINWIDDIE, their next
friend, *et als.*,

Respondents.

Petition for Writ of *Cer-
tiorari* to the United States
Circuit Court of Appeals,
Fourth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUS-
TICES OF THE SUPREME COURT OF THE UNITED STATES :

Your petitioner, Northwestern Mutual Life Insurance Com-
pany, a corporation organized and existing under the laws
of the State of Wisconsin and a citizen of the said State,
respectfully represents that on the 10th day of February,
1905, one, J. Samuel McCue, a lawyer and former Mayor of
the City of Charlottesville, in the State of Virginia, was
hanged in that City for the murder of his wife. He had at the
time upon his life a policy of insurance for \$15,000.00 in this
petitioning company. The circumstances surrounding the
issuance of this policy and the causes leading up to his
hanging are as follows :

On February 25th, 1904, the said J. Samuel McCue, made
application to the Northwestern Mutual Life Insurance Com-
pany at Charlottesville in Va. for a life insurance policy
upon his life in the amount of Fifteen Thousand Dollars
(\$15,000.00), the character of the policy being a ten-year renew-

able policy, the cheapest form issued by the company. Over his own signature, he stated that the insurance was desired for the benefit of his estate. Though this application was made in February, he stated that he desired the premiums should "be annual from 15th Sept." This application was accepted, and on March 15th, 1904, the policy No. 576576 was issued and delivered at Charlottesville, Va.

It was provided in the policy that the same should be payable "to such beneficiary or beneficiaries of James S. McCue * * * as may hereafter be nominated under this contract * * *, provided, however, that if no beneficiary should survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured." No beneficiary was ever nominated.

For reasons not disclosed, he desired the premiums to be paid from the date of the policy, March 15th, 1904, to September 15th, 1905, eighteen months, instead of the usual period of one year. Apparently he was without the cash to pay this premium, namely, \$427.50. Accordingly he arranged with E. L. Carroll and L. Fitzgerald, the parties who solicited the insurance, that they should take his note for this sum, dated March 15th, 1904, and payable to them individually six months after its date, the same to be treated as a cash payment and they to deliver to him a receipt for the premium and also the policy of insurance.

This was all done at Charlottesville, Va. The said Carroll and Fitzgerald sent the note with their own for the same amount attached thereto as collateral, to Cary, the State Agent of the Company at Richmond, Virginia, who in turn treated this as cash and remitted the \$427.50 to the Company at its home office in Milwaukee in due course of business, the Company having no knowledge of this note arrangement. It was in this manner that the contract of insurance was perfected and the policy of this Company was delivered to the insured in the City of Charlottesville, Virginia, on or about the 15th day of March, 1904.

On the 7th day of the following September, the said J. Samuel McCue was placed under arrest at his home in the City of Charlottesville, Virginia, charged with the murder of his wife, and although protesting his innocence, was incarcerated in the public jail of that town.

On the date of maturity of his note for \$427.50, namely September 15th, 1904, and while in jail, no trial having been had, and still protesting his innocence, this note was paid by McCue's check to Cary at Richmond, Va., who held it, together with that of Carroll and Fitzgerald as collateral security.

On the 5th day of November, 1904, McCue was convicted of murder in the first degree and on the 9th day of November, 1904, was sentenced to be hanged on the 20th day of January, 1905.

He applied to the Supreme Court of Appeals of Virginia for an appeal and the same was refused ; he then asked for a rehearing which was likewise refused for reasons given at length by that Court and on the 10th day of February, 1905, he was " hanged by the neck until he was dead ", all of which will appear from the record in this cause, and in the reported case of *Commonwealth v. McCue*. 103 Va. 870. On the 20th day of February, 1905, just ten days after the hanging, his brothers qualified as executors of his will and on the same day made oath to the proof of loss filed with this insurance company. They stated therein that the insured had met his death, not from disease or other natural cause, but by hanging on the 10th day of February, 1905. The medical doctor filed as part of the proof of McCue's death, a sworn statement that he died on the above date after an " illness of eighteen minutes duration " and not from any disease but from suffocation " by hanging ". These executors also swore in said proof that they were legally entitled to receive the entire amount payable on the policy " having qualified as executors and given bond required by law ". The claim was declined by the company on the ground that the death of the insured by hanging under sentence of a court of justice annulled the contract of insurance. It however offered to return the \$427.50 paid for the said contract and did deposit that sum in the Treasury of the Circuit Court for the Western District of Virginia.

It further appears that McCue left a will dated the 10th day of September, 1904, a copy of which is contained in the record by which will he disposed of all of his insurance money.

The grounds upon which the Northwestern Mutual Life Insurance Company denied payment in this case were as follows :

FIRST :

Death on the gallows was not one of the risks against which McCue was insured.

SECOND :

Even if it had been a risk specially contracted against a recovery under such circumstances would be contrary to public policy.

On the 29th day of September, 1905, J. William McCue and Ruby G. McCue, infant children of J. Samuel McCue, by Marshall Dinwiddie, their next friend, instituted a certain suit in chancery in the Corporation Court of the City of Charlottesville, in the State of Virginia, against this petitioner, the Northwestern Mutual Life Insurance Company, and others, and on the same day filed their bill in equity in the said cause and issued an attachment under the statute of the State of Virginia against the Northwestern Mutual Life Insurance Company. Although the policy was payable to McCue's estate and his executors filed proof of claim and swore that they were entitled to the insurance money, this suit was instituted in the name of the children of the insured and the executors were made parties defendant. The probable purpose of this procedure was to prevent the cause being removed to the United States Courts because some parties plaintiff and defendants were citizens of the same State. This however under the subsequent re-arrangement of the parties became immaterial. Subsequent thereto and in due and proper time, the Northwestern Mutual Life Insurance Company filed its petition upon the ground of diverse citizenship for the removal of the said cause from the Corporation Court of the City of Charlottesville in the State of Virginia, to the Circuit Court of the United States for the Western District of Virginia. The said petition for removal being proper in form and substance, the said cause was duly removed to the Circuit Court of the United States for the Western District of Virginia, and on the first day of January, 1906, the Northwestern Mutual Life Insurance Company filed

its demurrer to the bill of the said complainants and on the same day filed its answer thereto. Subsequently, the facts in the cause were, by stipulation of counsel, agreed to and made part of the record herein, and by agreement of counsel the parties, complainant and respondent, were re-arranged by the Court, proper parties were made plaintiff and proper parties defendant, and a jury waived, so that on the argument of the cause nothing was before the Court except a determination of the cause upon its merits. While the suit was one in equity, it had for its sole object the recovery of \$15,000 of insurance money from this petitioning Company upon its policy number 576,576. This is evident from the reading of the bill, and upon the subsequent rearrangement by the Court of the parties plaintiff and defendant, no other question was left for the Court's decision, it being a concession between counsel that they desired simply a determination of the question whether or not there could be under the law and facts a recovery of the insurance money where the insured died upon the gallows for wife murder.

On November 15th, 1906, the cause was argued before the Circuit Court, Honorable HENRY C. McDOWELL, District Judge for the Western District of Virginia sitting in chambers and on November 24th 1906, an opinion was rendered by the court sustaining in all respects the contentions of the Northwestern Mutual Life Insurance Company and the judgment of the court thereon was entered on the same day. On March 1st, 1907, J. Wm. McCue and others filed their petition for a writ of error, together with their assignment of errors, and on March 27th, 1907, an order was entered by the Circuit Court allowing the said writ of error and proper bond having been given the cause was appealed to the United States Circuit Court of Appeals for the Fourth Circuit. On the 4th day of February, 1908, the cause was argued in the said court before the Honorable JETER C. PRITCHARD, Circuit Judge and ALSTON G. DAYTON and EDMUND WADDILL, JR., District Judges, and on the fifth day of November 1908, the said court through District Judge DAYTON rendered its opinion reversing the Circuit Court for the Western District of Virginia, from which opinion District Judge WADDILL dissented. On the 14th day of December, 1908, the Northwestern Mutual Life Insurance Com-

pany filed its petition for a rehearing, and on the 17th day of May, 1909, the same was denied, the court failing to deliver any further opinion. On May 19th, 1909, an order was entered by the Circuit Court of Appeals staying its mandate pending this application to the Supreme Court for a writ of *certiorari* provided such application is presented to the Court on or before October 5th, 1909.

In order to set forth properly the errors of the Circuit Court of Appeals, it is necessary to consider briefly the contentions in this case.

On behalf of the Northwestern Mutual Life Insurance Company, it was contended that this case was identical in principle and parallel in fact with that of *Burt vs. The Union Central Life Insurance Company*, decided by this Court in 187 U. S. 362, the only distinguishing fact between the two being that McCue before his execution admitted the justice of his sentence, while in the *Burt* case it was contended that there was a miscarriage of justice; that it was controlled by the principles annunciated by the House of Lords in a similar case of *Amicable Society vs. Beland* (known as *Fauntleroy's case*) 4 Blight, N. S. 194, and in the analogous decisions of *Ritter vs. Mutual Life Insurance Company*, 169 U. S. 151, *Hatch vs. Mutual Life Insurance Company*, 120 Mass. 550, *Wells' Admr. vs. New England Mutual Life Insurance Company*, 191 Pa. 207, 42 Atl. 126, and various other cases holding that death resulting from the violation of the law was not such a contingency as was contemplated in or covered by a contract of insurance, in other words death on the gallows was an uninsurable risk and hence there could be no recovery in such a case regardless of whether the policy of insurance contained any stipulation with reference thereto. Counsel for the McCue estate seemed to recognize the force of the rule laid down in the *Burt* case, although they attempted at great length to distinguish it from the present case, and so, resorted to the argument that the contract of insurance was a special Wisconsin contract and in construing it, the Circuit Court of Appeals was compelled to follow the laws of Wisconsin, and could not regard it as a general contract to be controlled by the commercial law of the land as in the *Ritter* and *Burt* cases.

In reply to this contention, the Northwestern urged that

the policy was not a special Wisconsin contract, but a general ordinary contract of insurance made in Virginia and not in Wisconsin, but, regardless of the State where made, to be construed by the general commercial law of the land as applied by this court in the Burt and Ritter cases.

That this case is identical with Burt versus The Union Central, and to be controlled by the principle of that case, was recognized by the Circuit Court in the following language :

“ It follows that if there be a decision, not a mere dictum, of the Supreme Court of the United States fairly covering the exact question here presented, such decision is in this court absolutely binding. Burt vs. Insurance Company, 187 U. S., 362, seems to me to be incontestably such a case.”

The Circuit Court of Appeals in its opinion, delivered by District Judge DAYTON, is to the same effect, as follows :

“ It would seem very clear that touching general contracts of insurance, governed by the rules of commercial law, the Federal Courts in obedience to the ruling in the Ritter case must hold, regardless of State decisions, that no recovery can be had on a policy of insurance on the life of one who wilfully and deliberately, while in sound mind, took his own life. And we must go a step further and say that in the case of such contracts general in character and governed by the rules of commercial law, we must, regardless of State decisions, in view of the decision of the Supreme Court in the Burt case, hold that a policy of life insurance ‘ does not insure against the legal execution of the insured for crime.’ ”

The dissenting opinion of District Judge WADDILL, sitting as a member of the Circuit Court of Appeals, is to the same effect, as follows :

“ I am unable to concur with the majority of the Court in the view above expressed, believing as I do that the case is controlled by the de-

cision of the Supreme Court of the United States in *Burt vs. Union Central Insurance Company*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 263, and hence that the judgment of the lower court should be affirmed."

Your petitioner therefore respectfully urges that the decision which it seeks to have reviewed by this honorable Court rests on the concession that it would be controlled by the *Burt* and *Ritter* cases but for the sole and single reason that, in the opinion of the court, the policy of insurance on McCue's life was different from those involved in those cases, in that it was a *special contract* made in the State of Wisconsin under *special legislation* of that State (viz., the company's charter), and therefore to be determined by the local law of Wisconsin and not by the general commercial law as administered by this Court in the cases cited.

The language of the charter relied upon and quoted in the opinion of the court, Page 12, is stated by the court as follows :

" The legislative act of Wisconsin gave to this company the unlimited power to 'insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks.' "

This language is *exactly the same* as that of Sec. 2 of the charter of the Mutual Life Insurance Company which was involved in *Ritter's* case before this Court, and indeed, the same found in almost all the charters of the mutual life insurance companies of the country. See pp. 21-22 Petition for Rehearing of the Record.

Your petitioner, while referring the Court to the brief of its counsel in support of this petition, urges upon the attention of the Court the unhappy consequences resulting from a conflict between this decision of the Circuit Court of Appeals and the other Federal courts of the country as to the place where the contract of insurance upon McCue's life was made. Your petitioner feels that it hazards little in saying that the Circuit Court of Appeals, in reaching its decision that the policy on McCue's life was a special contract made in Wisconsin,

puts itself not only in direct conflict with this honorable Court in its conclusions reached in the Burt and Ritter cases, but in conflict with an unbroken line of decisions of the other Federal courts of this country supported by the authority of this Court.

In

Mutual Life Ins. Co. versus Hill, 193 U. S. 551,
this Court speaking through Justice BREWER in an unanimous opinion, laid down the following rule, namely :

“ The State where the application is made, the first premium paid by and the policy delivered to the assured, is the place of contract ”, citing

Equitable Life Assurance Society v. Clements, 140 U. S., 226.

Mutual Life Insurance Company of New York v. Cohen, 179 U. S., 262.

The agreed facts in this case (Page 31 of the Record) show that the application was made by McCue at Charlottesville, Virginia, February 25th, 1904, and that the policy was delivered to him at that place on March 15th, 1904, when he gave his note for the premium, which was payable at the said City of Charlottesville, in Virginia, and actually paid there by McCue September 14th and 15th, 1904. See pages 114 to 116 of the printed Record.

The attention of the Court is especially invited to the construction of one of the policies of this petitioning company in its suit versus Elliott, 5 Fed., 225, where the Court held that, though the company was chartered in Wisconsin and had its home office there,

“ The premium was paid to the agent of the plaintiff at Portland (Oregon), who then and there counter-signed and delivered the policy. This was the consummation and completion of the contract. But to put this beyond a doubt, the policy itself declares that it shall not be binding upon the company until these acts are performed. And, until it was binding upon the company, it was not binding upon the applicant; in short it was not yet a contract, but only a proposition.”

This rule was held to obtain in Burt's case, although there was a provision in that policy, made a part of the contract, declaring that it was an Ohio contract and should

"be held and construed to have been made in the City of Cincinnati, Ohio."

No cases are found in opposition to this rule, and the following are cited among those which unequivocally sustain it:

Mutual Life Insurance Company of New York v. Cohen, 179 U. S., 262.

Equitable Life Assurance Society v. Clements, 140 U. S., 226.

Those acts mentioned in Hill's case as fixing the place of the contract being admitted in the agreed facts to have occurred in the State of Virginia, it follows that the policy on McCue's life was not a Wisconsin contract, but a Virginia contract. This, however, your petitioner repeats, did not and does not make the contract other than one of that general commercial character which is construed according to the rules of this Court,—in a word, just such as was passed upon in Burt's and Ritter's cases.

Your petitioner therefore urges that if the decision of the Circuit Court of Appeals is allowed to go uncorrected, it will result in a most serious conflict between the various circuits of this Union, as well as a substantial overruling of Burt's case.

The United States Circuit Court of Appeals for the Fifth Circuit has recently reached a conclusion contrary to that of the Circuit Court of Appeals for the Fourth Circuit in this case. The case referred to is,

Maner v. Penn Mutual Life Insurance Co., Philadelphia.

Unfortunately, the court rendered no opinion in the case. The case arose in the State of Texas, and involved the question of whether or not there could be a recovery where the insured died as a result of his violation of the law, where he was killed in a fight begun by himself. The court denied the right of recovery.

SUMMARY.

The insurance policy on McCue's life was not a Wisconsin contract, but a Virginia contract.

Mutual Life Ins. Co. v. Hill, 193 U. S. 551.

The law of Virginia prohibits a recovery in a case like this :
Plunkett v. Supreme Conclave, etc., 105 Va. 643.

Regardless of the State where the contract of insurance is made, the general commercial law is applied in the courts of the United States :

Swift v. Tyson, 16 Peters, 18.

Washburn & Moen Mfg. Co. v. Reliance, etc., Ins. Co., 179 U. S., 1.

The courts of the United States deny the right of recovery in behalf of an insured who dies on the gallows in expiation of a crime, regardless of the terms of a policy :

Burt v. Union Central Life Ins. Co., 187 U. S., 362.

If the law of Wisconsin applied in this case it would not justify the conclusion reached by the court, because it deals only with questions of suicide, which is not a crime in that State.

It is respectfully submitted that this case is one in which it is eminently proper that the writ of *certiorari* should issue, because there is a division of opinion among the judges who heard this case in the lower court and because the conclusion reached by them is at variance with the decision of this Court and of other Circuit Courts upon the same and all kindred questions. Hence the lack of uniformity of decisions which is considered a ground for the issuance of this writ exists. In addition thereto, the questions involved are of great importance to the insurance interests of this country, involving as they do rules for the interpretation and construction of policies of insurance, questions of sound policy and morals, and other questions of equal magnitude.

The case being thus practically limited to the question as to whether the policy of insurance was a special contract made in Wisconsin to be determined by the local laws of Wisconsin, or a general contract of insurance to be construed by the commercial law as administered by the courts of the United

States, your petitioner respectfully represents that the decision of the Circuit Court of Appeals is erroneous, in that :

FIRST :—The Court erred in holding that the policy of insurance in this case was a special Wisconsin contract instead of a Virginia contract.

SECOND.—The Court erred in holding that the policy of insurance was not a contract to be construed by the general commercial law of the country as enforced in the Courts of the United States, regardless of the laws of the State where it was made.

THIRD.—In holding that the laws of Wisconsin authorized a recovery in this case and decreeing accordingly.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled : “ United States Circuit Court of Appeals, Fourth Circuit, No. 739, J. William McCue, Samuel O. McCue, Harry M. McCue, and Ruby C. McCue, infants, by Marshall Dinwiddie, their next friend, *et al*, Plaintiffs in Error, versus Northwestern Mutual Life Insurance Company, *et al*, Defendants in Error—In error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg ”, to the end that the said case may be reviewed and determined by this court as provided in Sec. 6 of the Act of Congress entitled “ An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes, approved March 3rd, 1891 ; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

WM. H. WHITE,

WM. H. WHITE, JR.,

Counsel.

STATE OF VIRGINIA, }
 City of Richmond, } ss. :

WM. H. WHITE, being duly sworn, says that he is one of the counsel for the Northwestern Mutual Life Insurance Company, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

 Subscribed and sworn to before me by Wm. H. White, this
 the day of A. D. 1909.
 My Commission expires

 Notary Public.

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138
[REDACTED]
No. [REDACTED]
U. S. SUPREME COURT, D. C.
FILED
SEP 27 1899
JAMES N. McKENNEY
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1906.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

J. WILLIAM McCUB ET ALB.,
Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,
Petitioner,

VS.

J. WILLIAM McCUE, ET ALS.,
Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

For statement of facts not contained here, reference is made to the record and petition filed herewith.

The facts show the existence of an ordinary policy of insurance in a mutual life insurance company, issued upon an application made in Virginia, where the first premium was paid and the policy delivered, upon the life of a man who, admitting the justice of his sentence, paid the penalty for the murder of his wife, by death upon the gallows. The policy contained no provision covering death resulting from a violation of the law. The application which was made part of the policy did contain restrictions concerning the occupation and travels of the insured, and also this provision "or shall within one year from the date of said policy, whether sane or insane, die by my own hand, then and in every such case, any policy issued on this application shall be null and void."

The question thus fairly and squarely presented for the decision of the Circuit Court of Appeals was identically the same considered and decided by this Court in

Burt vs. Union Central Life Insurance Co., 187 U. S., 362, namely :

Can There be a Recovery on a Life Insurance Policy Where the Insured is Legally Executed, the Policy Being Silent on the Subject.

The Circuit Court of Appeals, while conceding that this question must be answered in the negative if Burt's case applied, decided that it did not apply, because the contract involved was a Wisconsin contract, made in pursuance of special concessions in its charter contained and to be construed according to the laws of that State, and was not a general contract of insurance, such as the policy in Burt's case, to be construed according to the general commercial law of the United States.

The facts in the case at bar were conceded to be substantially the same as, or even stronger than, those in Burt's case, but relying, as aforesaid, on some particular language in the charter of the Northwestern, the court found ground for distinguishing it from the rulings of this Court in the Burt case, above referred to.

In reaching this conclusion, it is earnestly contended that the court committed the errors assigned in the petition for this writ, namely :

1. The court erred in holding that the policy of insurance in this case was a Wisconsin contract instead of a Virginia contract.

2. The court erred in holding that the policy of insurance was not a contract to be construed by the general commercial law of the country, as enforced in the courts of the United States, regardless of the laws of the State where it was made.

3. In holding that the laws of Wisconsin authorized a recovery in this case.

The Court is assured that the petitioning company is not controlled in the relief here sought by the amount involved in this case, but by the sincere belief that the errors assigned, if not corrected, will establish for the Fourth Judicial Circuit rules not only different from those prescribed by this Court in the following cases :

Burt vs. Union Central Life Insurance Company,
187 U. S., 362 ;

Ritter vs. Mutual Life Insurance Co., 169 U. S.,
130 ;

Mutual Life Ins. Co. vs. Hill, 193 U. S., 55 ;

Northwestern Mut. Life Ins. Co. vs. Elliott, 5 Fed.,
225,

and other cases hereinafter cited, but different from those prevailing in the other circuits of the Union, all of which will result in great confusion in the construction of thousands of insurance policies, life, fire, marine and accident, involving millions of dollars.

We allude especially to the finding of the court that the policy of insurance in this case was a special Wisconsin contract governed by the laws of that State, and not to be construed by the general commercial law enforced by the Federal courts in cases of insurance contracts generally. A condition, we repeat, which in operation would result in countless policies of insurance outstanding in this country being construed by the United States courts in accordance with the laws of the forty-eight states to which the several companies may owe their charters, instead of by the single rule of the commercial law announced by this Court in an unbroken line of decisions.

Various insurance companies have for years sought to evade the laws of the States in which they may be doing business by a provision in the policy declaring that it is a contract to be construed by the law of the State where the company was chartered. But in spite of such a provision the Federal courts have uniformly held that such policies were contracts of the State where the application was made and the premium paid by and the policy delivered to the insured, and were to be construed by the general commercial law. In a word, the rule is that although the policy may contain a provision that

it is to be considered as a contract of the home State and governed by the laws of such State, still such a provision will not prevail against the laws and policy of the State where the contract is actually made by the payment of the premium and the delivery of the policy, and its interpretation and construction will be controlled by the general commercial law of the United States regardless of the State where made.

All other questions involved in this suit become of minor importance as compared with this far-reaching one. The opinion of the Court, at pages 9 and 10, concedes that if the general commercial law applies then, under the case of

Burt vs. Union Central Life Insurance Company,
187 U. S., 362,

the judgment of the Circuit Court is correct and cannot be disturbed. This, therefore, is stated by the Court to be the crucial question.

At page 11 of its printed opinion, the Court says :

"It therefore becomes important for us to determine first whether this insurance policy was a Wisconsin contract or simply a commercial one, and, second, whether the rule of public policy in Wisconsin, if there be any, is contrary to that enunciated by the Supreme Court."

It then proceeds to hold it to be a contract not enforceable under the general commercial law, but a special Wisconsin contract enforceable according to the laws of that State. It cites, however, no authority for this conclusion, but its reasons are stated at pages 11 and 12 as follows :

"The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that State, which distinctly defines its power and obligations. This act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those 'who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns * * * shall thereby become members thereof during the period they shall remain insured.' It gives to them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and officers; to sue

said corporation and to be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualifications of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies. In addition to this the policy on its face shows it was executed at the office of the company in Wisconsin and by its express terms was made payable there. This being true, the conclusion is inevitable.

This contract must be held to be a Wisconsin one, to be construed according to its laws."

It will be observed that the Court does not state *where the application was made nor where the first premium was paid, nor where the policy was delivered, nor does it make any allusion to the express provision of the policy that it should not become a contract until the first premium was actually paid by the insured. Yet these several acts have been expressly held by this Court as fixing conclusively the place where the contract was made.*

Mutual Life Insurance Company vs. Hill, 193 U. S., 55.

Justice BREWER, in delivering the opinion of a unanimous court, in stating the several propositions which had been established by prior decisions of that Court in regard to the construction of life insurance policies, laid down the following rule, namely :

"The State where the application is made, the first premium paid by and the policy delivered to the assured, is the place of contract,"

citing

Equitable Life Assurance Society vs. Clements, 140 U. S., 226.

Mutual Life Insurance Company of New York vs. Cohn, 179 U. S., 262.

It is therefore confidently urged that :

The Policy Was Not a Wisconsin Contract But a Virginia Contract, Because the Application Was Made, the Premium Paid, and the Policy Delivered in Virginia.

The agreed facts in this case, show that the application was made by McCue at Charlottesville, Virginia, February 25th, 1904, and that the policy was delivered to him at Charlottesville, Virginia, on March 15th, 1904, when he gave his note for the premium, which note was payable at said City of Charlottesville, in Virginia, and actually paid there by the checks of McCue given in the said City September 14th and 15th, 1904. See pages 114, 115 and 116 of the printed record.

The above facts having been agreed make it a concession in this case.

In addition to this, the policy itself provided as follows :

“This policy shall not take effect until the first premium shall have been actually paid.”

It so happens that this very provision of the policy of this petitioning company has been construed by one of the Circuit Courts of the United States. We allude to the case of

Northwestern Mutual Life Insurance Co. vs. Elliott,
5 Fed., 225,

wherein the court, holding the policy to be an Oregon and not a Wisconsin contract, says as follows :

“Where then was this contract made : in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract binding upon the parties.

“The premium was paid to the agent of the plaintiff at Portland (Oregon), who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be

binding on the company until these acts are performed. And, until it was binding upon the company, it was not binding on the applicant ; in short it was not yet a contract, but only a proposition."

In a word, the policy and charter involved in this case differ in no legal or essential features from those in *Ritter's Case*, 169 U. S., 139.

In the policy of the Union Central Life Insurance Company, issued to the assured in Burt's case, the following provision occurs :

"This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page thereof which are made a part of this contract, *which contract shall be held and construed to have been made in the City of Cincinnati, Ohio*" (Transcript Record, Burt's case, p. 6).

In spite of this express provision declaring the contract to be an Ohio contract, the Supreme Court in deciding the case applies the rule of the general commercial law, and not that of Ohio.

We are therefore justified with confidence to urge upon the court a consideration of the first point made by us ; namely *that it is a Virginia contract and not a Wisconsin contract, and is to be construed by the general commercial law of the land as laid down by this Court in Burt's case, and others, regardless of the laws of the State where made.*

It needs no argument to establish the principle that a policy of insurance is a contract, whether it be Fire, Life, Marine, Accident or Personal Liability, and therefore is in all respects and in all its phases to be treated and construed as any other contract. The following authorities so hold :

"Life insurance imports a mutual agreement. * * *"

Ritter vs. Mutual Life Ins. Co., 169 U. S., 130.

"The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no differ-

ence whatever between insurance against fire, insurance against the perils of the sea, or insurance of life."

New York Life Insurance Co. vs. Cravens, 178 U. S., 389.

St. Johns vs. the Amer. Mut. Life Ins. Co., 13 N. Y., 31-38.

Rosenplanter vs. Provident Sav. Life Assur. Soc., 96 Fed., 721-2.

It is a general rule that all contracts are made where the last acts are performed to make them binding. The reasons above quoted given by the court for its conclusion that the contract here was a Wisconsin contract do not mention those final acts, also above cited, which are necessary to make the contract between McCue and the Northwestern Mutual Life Insurance Company a binding contract. On the contrary, the Court bases its conclusion on the following :

A. The defendant is a Wisconsin corporation ;

B. Being a mutual company, its members acquire certain rights not enumerated in the policy ;

C. Policy shows on its face that it was executed in Wisconsin ;

D. By express terms made payable in Wisconsin.

The provisions of this policy thus referred to by the Court are identically the same in most instances and substantially such in all respects as those contained in the ordinary life policies of the mutual companies of all the States. The charter of the Northwestern Mutual Life Insurance Company and its policy in this case differ in no legal essentials from that of the Mutual Life Insurance Company of New York, which was involved in Ritter's case, 169 U. S., 151, and that of the Union Central Insurance Company in Burt's case, 187 U. S., 362.

Reference to the charter of the Mutual Life in the Ritter case (see also charter of Mutual Life Insurance Company in "Charters of American Life Insurance Companies," published by the Spectator Company of New York, edition of 1906, page 174, etc.,) shows that its provisions are identical with those of the Northwestern Mutual. Indeed the latter was manifestly taken literally from the former. This is not surprising since the Mutual Life was chartered in 1842 and is regarded as the parent Mutual Life Company in this country, while the North-

western was only chartered in 1857. The provisions in the charter of the Northwestern Mutual quoted and relied on in the opinion of the Court, p. 11-12, are taken literally from that of the Mutual Life as follows :

CHARTER OF NORTHWESTERN
MUTUAL.

SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess and convey shall :

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer.

CHARTER OF MUTUAL LIFE
INSURANCE COMPANY OF NEW
YORK.

SECTION 2. * * * The corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities.

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be :

SECTION 3. (Members)—All persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in the said corporation, as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation, and no longer.

These provisions are for all legal purposes identical and repel the idea that the policy on McCue's life constituted a special contract of Wisconsin not within the general commercial law applied to the Ritter policy.

Every corporation chartered by any State is a citizen of that State, but we submit there is no rule of law which holds that when a corporation, for instance of California, completes a contract in Maine it is a California contract simply because one of the parties to it is a citizen of California. The Northwestern Mutual Life Insurance Company, one of the parties to this contract, is a citizen of Wisconsin. McCue, the other

party to the contract, was a citizen of Virginia. The reasoning of the Court, we think, is erroneous in selecting the domicile of the Insurance Company rather than that of McCue as determining where the contract was made. It may be, as the Court says, that McCue obtained certain rights not mentioned in the policy, but is this not equally true of every person dealing with a corporation? In this respect it in no wise differs from the insured in Ritter's case, which involved a mutual company. This, we submit, cannot make a contract finally made by a corporation in a State other than its domicile, a contract of its home State. If this is not true, then a Virginia corporation could embody in its charter or by-laws a provision to the effect that "All contracts entered into by this corporation, wheresoever they may be finally completed, shall be Virginia contracts," and thus in disregard of the law of the State where the contract is made and it is doing business, carry with it the laws of its own home State and force the same upon the citizens of the State where it is permitted as a foreign corporation to do business. Certainly the Court could not have considered such a consequence in reaching its conclusion.

We respectfully suggest that further argument on this point to show that this was a Virginia contract and not a Wisconsin contract is not necessary, in view of the express ruling of the Supreme Court of the United States in

Mutual Life Ins. Co. vs. Hill, 193 U. S., 551.

The policy in that case was issued by a mutual life insurance company in behalf of George D. Hill, at Seattle, in the State of Washington, upon a written application made by him in that State and sent to the home office of the company, in New York, was accepted by the company and a policy signed by it in its home office in the State of New York, and forwarded to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. In that case the children of the decedent were the beneficiaries, and the money was made payable in the event of death at the home office of the company in New York. The very same facts or conditions existed in that case as are mentioned in the Court's opinion as existing in this; namely:

A. The defendant company was a New York corporation,

"owing its life to a special Act of the Legislature of that State."

B. It was a mutual company of which the insured, by the Act of Insurance, became a member entitled to rights and privileges not enumerated in the policy.

C. The policy on its face showed that it was executed at the office of the company in New York.

D. By its express terms was made payable in the City and State of New York.

The parallelism between the case at bar and Hill's case being absolutely perfect in all legal essentials, except that in Hill's case there was an express provision in the policy that "*The contract of insurance when made shall be held and considered at all times and places to have been made in the City of New York.*" There is no such provision in the policy in this case. Yet, notwithstanding such a provision in the Hill case, the court held that the policy was made at Seattle, in the State of Washington, and was therefore a Washington contract. The case at bar is therefore very much stronger, because had there been in McCue's policy a provision that it was a contract made in Wisconsin to be controlled by the laws of Wisconsin, and had there been among the laws of that State one expressly allowing a recovery in the event that McCue should die on the gallows for murder, that law being contrary to the public policy as announced in Burt's case, and, as we will presently see, in the State of Virginia, it could not, under the ruling in the Hill case, be held to be a Wisconsin contract and a recovery allowed under it.

It must be manifest, therefore, to this Court, upon a careful reading of this case, and Clements' and Cohen's cases cited by Justice BREWER, that the reasons assigned by the Circuit Court of Appeals for making the McCue policy a Wisconsin contract are not sufficient, and therefore that court erred in so holding.

Many decisions, both State and Federal, appropriate in support of the point being discussed could be cited and quotations made. We, however, refer the Court to only a few, as follows :

Mutual Life vs. Cohen, 179 U. S., 264,
where Justice BREWER says, at page 264 :

"The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana (The Mutual Life is a N. Y. Corp.). *Under those circumstances, under the general rule, the contract was a Montana contract and governed by the laws of that State.* Equitable Life Assurance Society v. Clements, 140 U. S., 226, 232." (Italics ours.)

In *Hicks vs. National Life Ins. Co.*, 60 Fed., 690, the insurance company was a Vermont corporation, the insured was a citizen of New Jersey, the premiums were paid in New York. Judge WALLACE, in speaking for the Circuit Court of Appeals, says :

"If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premium paid there, is a New York contract, *notwithstanding it is signed and issued by the insurer in another State*, the reference is supplied by the case of Assurance Soc. vs. Clements, 140 U. S., 226 ; 11 Sup. Ct., 822." (Italics ours.)

25 Cyc., p. 748, says :

"The State where the policy is finally delivered by the agent of the company to the assured who there pays the premiums, delivery and payment of premium being essential to the final execution and taking effect of the contract, is the State in which the contract is made and by the laws of which it is to be construed, in the absence of any special provision to the contrary."

There is no provision to the contrary in this case.

In *Minor on the Conflict of Laws*, the author at page 399, speaking of the *locus celebrationis* of an insurance policy, says :

"Again, the payment of the first premium is often by the terms of the agreement, made the event upon which the policy is to become binding. In such case,

the place where the premium is paid is the *locus celebrationis* of the insurance contract."

The same principle has been cited and followed in the following cases :

Cravins vs. N. Y. Life Ins. Co., 148 Mo., 600 ; 71 Am. St. Rep., 637 ; 50 S. W., 519.

Wall vs. Equitable Life Assur. Soc., 32 Fed., 273 (opinion by Justice BREWER, now of the Supreme Court).

Mutual, etc., Co. vs. Robinson, 54 Fed., 580.

Equitable Life Ins. Co. vs. Winning, 58 Fed., 541.

McMaster vs. N. Y., etc., Co., 78 Fed., 33, 37.

Holmes vs. Charter Oak Life Ins. Co., 131 Mass., 64.

Assurance Society vs. Clements, 140 U. S., 226.

This brings us to the second point, namely, that the Court erred

In holding that it was not a contract to be construed by the general commercial law of the country as enforced by the Federal Courts regardless of the State where it was made.

We have partially discussed this point already because it was necessarily involved in some of the cases referred to in support of the first proposition.

On all questions of general commercial law, such as contracts and especially insurance contracts, the Federal courts follow their own rules. This has been the unvarying interpretation of the Federal Judiciary Act from its enactment, and it is nowhere better expressed than by Justice STORY in

Swift vs. Tyson, 16 Peters, 18,

where he says :

" But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive fixed, or ancient local usage ; but they deduce the doctrine from the gen-

eral principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. * * * Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

The same ruling is followed in :

Oates vs. First Nat. Bank, 100 U. S., 239, 246.

Railroad Co. vs. Lockwood, 17 Wall., 357.

Manhattan Life Ins. Co. vs. Broughton, 109 U. S., 121, 126.

Pleasant Township vs. Aetna Life Ins. Co., 138 U. S., 67.

Lake Shore, etc., R. Co. vs. Prentice, 147 U. S., 101, 106.

It only remains, therefore, to enquire whether the construction of a policy of insurance is a contract coming within the general commercial law. And here again we find no confusion or contrariety in the decisions of this Court, but a unanimous line of authorities.

In *Carpenter vs. The Providence Ins. Co.*, 16 Pet., 495,

Justice STORY says, at Page 511 :

"The questions under our consideration are questions of general commercial law, and depend upon the

construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Washburn & Moen Mfg. Co. vs. Reliance Marine Ins. Co.*, 106 Fed., 116-7; Affirmed in 179 U. S., 1 :

Chief-Justice FULLER says, at Page 14 :

"It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that Commonwealth (*Kettell vs. Alliance Ins. Co.*, 10 Gray, 144; *Mayo vs. India Mut. Ins. Co.*, 152 Mass., 172).

"Even if this were absolutely so, we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. *The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the State decision as in matters of purely local law.*" (Italics ours.)

The Barnstable, 181 U. S., 464, 470 :

"As the construction of a policy of insurance is one of general rather than one of local law (*Liverpool and Great Western Steam Co. vs. Phoenix Ins. Co.*, 129 U. S., 397, 443; *Gloucester Ins. Co. vs. Younger*, 2 Curt., 322), we are constrained to adopt our own views as to such construction, though the Courts of the State in which the cause of action arose have adopted a different law." (Italics ours.)

It follows, therefore, from what has been said, that this contract and questions arising under it ought to be construed under the general commercial law, which being true, the law of Wisconsin was in no way controlling upon the court, even though it should hold that the contract of insurance was a Wisconsin contract—a proposition which to our minds is untenable in view of the express declaration of Chief-Justice FULLER in *Washburn & Moen Manufacturing Co. vs. Reliance Insurance Co.*, *supra*.

It is now axiomatic in the law that an insurance company chartered by one State cannot do business in another except with the permission of the latter and subject to the terms, conditions and laws of the State in which it may so seek to do business. When the Northwestern Mutual Life Insurance Company came to Virginia and took McCue's application, received his first premium and delivered to him the policy in this suit, it became bound by the insurance laws and the public policy of Virginia as fully as if it had been incorporated by it. More than this, for the purposes of its Virginia business, it ceased to be subject to the Wisconsin laws in conflict with those of Virginia.

McCue's policy could not be a special Wisconsin contract to be construed by any law or policy of that State inconsistent with those of Virginia and the general commercial law.

"That Missouri could forbid life insurance companies of other States from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted in view of the decisions of this court."

Northwestern Nat'l Life Ins. Co. vs. Riggs, 203 U. S., 255.

The court, after holding that the contract was a Wisconsin contract, declined to interpret it under the general commercial law, but instead followed a Wisconsin case, which, as it said, established a rule of public policy conclusive of this contract. The act incorporating the defendant company the court says at page 12 of the printed opinion, "did not limit the power to assume life risks, but expressly gave power to assume all and every such. We would simply be indulging in judicial legis-

lation for the State of Wisconsin if we should add to this act 'except those arising from suicide or hanging.'"

If this last statement be true, then this Court has indulged in judicial legislation in the Ritter case and in the Burt case.

To assume "all risks" means all insurable risks, and the reason that death by hanging is not excluded in the same part of the policy which prohibits the insured engaging in hazardous enterprises, is because the latter are insurable risks in no way *contra bonos mores* while the former is an uninsurable risk, one which even if written in the policy would not allow a recovery, since it has been declared by the House of Lords and this Court to be violative of good conscience and sound public policy.

All corporations have by their charter the express or implied power to enter into any and all contracts in connection with their business, but this does not mean that they may enter into *ultra vires* contracts or those illegal *per se* or those *contra bonos mores*, nor does it mean that if they enter into such contracts that they will be upheld. So the right to assume all insurance risks does not mean to assume an illegal risk.

The court quoting from Section 3 of the charter of the Northwestern Mutual Life, as follows :

"The corporation hereby created shall have the power to insure the lives of its respective members and to make all and every risk appertaining to or connected with life risks and to grant and purchase annuities."

concludes therefore that it has the power to insure against death by hanging and death by suicide. This provision is almost identical with that contained in the charters of all of the large insurance companies operating in the United States.

See "Charters of American Life Insurance Companies," *supra*.

The charter provision of the Mutual Life gives that company :

"The power to insure their respective lives and to make all and every insurance appertaining to or connected with life risks and to grant and purchase annuities."

The charter of the Equitable Life Insurance Society of the United States states that its business :

“ Shall be to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith.”

The charter of the Life Insurance Company of Virginia, granted by the Legislature of that State, states that its purpose is to carry :

“ On the business of insurance on lives and to make all and every insurance appertaining thereto or connected therewith.”

The charter of the Maryland Life Insurance Company, granted by the Legislature of that State enacts :

“ That the business of the said corporation shall be to make insurance on the lives of individuals and accidents by travel and every insurance appertaining thereto or connected with such risks and to grant, purchase or dispose of annuities.”

The charter of the New York Life Insurance Company granted it by the Legislature of that State says :

“ The business of the company shall be insurance on lives and all and every insurance pertaining to life.”

These quotations show clearly that the charters of other insurance companies, both stock and mutual, which have been passed upon by state courts, by the circuit courts and the Supreme Court contain provisions almost identical with that of this defendant company and therefore there is nothing peculiar in the charter of this company which gives the assured any rights or privileges different from that of the policy holder in any of the other insurance companies above named. In none of the cases against the Mutual, Equitable Life and others whose charters are above quoted has it been held that the power to insure lives and to make all and every insurance appertaining to or connected with life risks, includes the power

to insure against death in violation of law, or death upon the gallows.

What we have said makes it unnecessary to discuss the supposed public policy of Wisconsin, because under the rule laid down in *Mutual Life vs. Hill*, had there been in that State a statute declaring that in the event that McCue should die on the gallows, that this defendant company could not set it up as a defense, that statute would have been inoperative upon a contract made in a State where the public policy was in conflict with it, as is the case in Virginia. The rule in Virginia is laid down by a unanimous court in the case of *Plunkett vs. Heptasophs*, 105 Va., 643, where in affirming the opinion of the Circuit Court which denied a recovery in the case of a suicide, *KEITH, P.*, after quoting from *Burt's case*, *Ritter's case* and *Fauntleroy's case*, says :

"We think the authorities cited fully vindicate the opinion and judgment of the Circuit Court and it is affirmed."

Third Assignment of Error, in Holding that the Laws of Wisconsin Authorized a Recovery in this Case.

In reaching the conclusion involved in this assignment, the Circuit Court of Appeals relied on the case of *Patterson vs. National, etc., Insurance Co.*, 100 Wisconsin, 118, 42 L. R. A., 253, which case the court states establishes the public policy for Wisconsin. We respectfully insist that this case does not tolerate such a conclusion. The Wisconsin Court there says :

"Nor would the application of that principle to this case necessarily conflict with the *Ritter* case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured."

This to our mind shows that the Wisconsin Court recognizes a clear distinction between that class of cases where the policy is made payable to a third party who has acquired some valuable interest therein, and cases like the Ritter case and the present case where it is payable to the estate of the assured. Indeed the Court says that its decision does not conflict with that in the Ritter case. This distinction is stated by the Court when it declines to say what the law would be in a case like the present one.

“Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us.”

We submit that the court erred in holding that the cases of *Patterson vs. Life Insurance Company*, 100 Wisconsin, and *McCoy vs. Northwestern Relief Association*, 92 Wisconsin, 577, 66 Northwestern, 697, which were cases of suicide, are in any way analogous to cases involving death in consequence of crime, for the reason that in Wisconsin suicide is not a crime and the court in the opinion in the *Patterson* case laid special stress upon that fact. Consequently, one who committed suicide did not violate the law of Wisconsin and therefore there was no question of the public policy of that State involved in the decision in the *Patterson* case.

In the Circuit Court of Appeals reference to *Whitfield vs. Aetna Life Insurance Co.*, 205 U. S., 489 (page 9, printed opinion) it says :

“By this decision it seems to us we reach bed rock in this matter.”

Again we submit that this case is in no way contrary to the rule laid down in *Equitable Life vs. Clement*, *supra*, and the other cases following it. On the contrary, it is in all respects a confirmation of the views expressed in that case and in the case of *Hill vs. The Mutual Life Insurance Co.*, 193 U. S., 551. The defendant in error, a Connecticut corporation, issued its accident policy upon the life of James Whitfield, a resident of Missouri. There was a Missouri statute which declared that insurance companies doing business in

that State could not make the defense that the insured committed suicide, while the policy contained a provision that in the event of suicide the insured should recover one-tenth of the principal amount. In order to give effect to this Missouri statute it was necessary for the Court to reach the same conclusion that was reached in the Hill case, namely, that the contract of insurance was a Missouri contract and that the statute of Missouri prevailed over any provision contained in the policy, and the reason that the contract was a Missouri contract is the same as that stated in *Equitable Life vs. Clements*, namely, the premium was paid and the policy delivered in the State of Missouri. For statement of facts see 144 Fed., 356. If there is any analogy between the Whitfield case and the present case it would simply result in compelling this Court to follow any statute of Virginia which would bear upon the right of recovery in this case, and in Virginia there is no such statute. In view of the Whitfield case, it cannot be denied that a State may adopt a public policy applicable to foreign insurance companies doing business in it, but the Court in its opinion has overlooked the all-important fact that the *public policy applied in that case was not the public policy of Connecticut, the home of the insurance company, but the public policy of Missouri, in which State the contract of insurance was consummated, and where the insured resided.* Applying this case to that at bar, it follows that McCue's policy having been paid for and delivered in Virginia was a Virginia contract and the public policy and laws of Virginia, and not those of Wisconsin, controlled it.

Without having the official report in hand, we are advised of and beg to call the attention of the Court to the following:

The United States Circuit Court of Appeals for the Fifth Circuit has recently reached a conclusion contrary to that decided by the Circuit Court of Appeals for the Fourth Circuit in this case. The case referred to is *Maner vs. Penn Mutual Life Insurance Company, of Philadelphia*. Unfortunately, the Court rendered no opinion in the case. The case arose in the State of Texas, and involved the question of whether or not there could be a recovery where the insured died as a result of his violation of the law, where he was killed in a fight begun by himself. The Court denied the right of recovery.

Conclusion.

In conclusion, we respectfully submit that a careful study of *Equitable Society vs. Clements*, 140 U. S., p. 226; *Ritter vs. Mutual Life Insurance Co.*, 169 U. S., 139; *Burt vs. Union Central Insurance Co.*, 187 U. S., 362; *Mutual Life Insurance Co., vs. Hill*, 193 U. S., 551, will amply sustain the petition for the writ of *certiorari*.

Respectfully submitted,

WM. H. WHITE,

WM. H. WHITE, JR.

Supreme Court of the United States.

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.

DEC 15 1911

JAMES H. MCKENNEY,
CLERK.

NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

Plaintiff in Error,

vs.

J. WILLIAM McCUE, SAMUEL O. McCUE,
HARRY M. McCUE and RUBY G.
McCUE, infants, by Marshall Dinwiddie,
their next friend, ET AL.,

Defendants in Error.

No. ~~138~~ 138.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM H. WHITE,
Richmond, Virginia,
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Norfolk, Virginia,
*Counsel for Northwestern Mutual
Life Insurance Company.*

GEORGE H. NOYES,
JOHN R. DYER,
Milwaukee, Wis.,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1910.

NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,
Plaintiff in error,

vs.

J. WILLIAM McCUE, SAMUEL O.
McCUE, HARRY M. McCUE and
RUBY G. McCUE, Infants, by MAR-
SHALL DINWIDDIE, Their Next
Friend, *et al.*,
Defendants in error.

No. 338.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

History of the Case :

This case is before this Court upon a writ of *certiorari* to the Circuit Court of Appeals for the Fourth Circuit, granted on the 18th day of October, 1909.

A more comprehensive understanding will be obtained by a recital of its facts, followed by a history of its course in the lower courts. The record (see agreed facts and exhibits therewith, record, p. 75 to 99) shows these facts to be as follows :

On the 10th day of February, 1905, one J. Samuel McCue, a lawyer and former Mayor of the City of Charlottesville, in the State of Virginia, was hanged in that City for the murder of his wife, having prior to his execution confessed his guilt. He had, at the time, upon his life, a policy of insurance for

\$15,000 with the plaintiff in error. The circumstances surrounding the issuance of this policy and the causes leading up to his hanging are as follows :

On February 25th, 1904, the said J. Samuel McCue made application to the Northwestern Mutual Life Insurance Company, at Charlottesville, in Virginia, for a life insurance policy upon his life in the amount of Fifteen Thousand (\$15,000) Dollars, the character of the policy being a ten-year renewable policy. Over his own signature, he stated that the insurance was desired for the benefit of his estate. Although the application was made in February, he stated that he desired the premiums should "be annual from 15th Sept." This application was accepted, and on March 15th, 1904, the policy No. 576,576 was issued and delivered at Charlottesville, Va.

It was provided in the policy that the same should be payable "to such beneficiary or beneficiaries of James S. McCue * * * as may hereafter be nominated under this contract, * * * provided, however, that if no beneficiary should survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured." No beneficiary was ever nominated.

For reasons not disclosed, he desired the premiums to be paid from the date of the policy, March 15th, 1904, to September 15th, 1905, eighteen months, instead of the usual period of one year, and annually thereafter. Apparently he was without the cash to pay this premium, namely, \$427.50. Accordingly he arranged with E. L. Carroll and L. Fitzgerald, the agents who solicited the insurance, that they should take his note for this sum, dated March 15th, 1904, and payable to them individually six months after its date, the same to be treated as a cash payment and they to deliver to him a receipt for the premium and also the policy of insurance.

This was all done at Charlottesville, Va. The said Carroll and Fitzgerald sent the note with their own for the same amount attached thereto as collateral, to Cary, the State Agent of the Company at Richmond, Virginia, who in turn treated this as cash and remitted the \$427.50 to the Company, at its home office in Milwaukee, in due course of business, the company having no knowledge of this note arrangement. It was in this manner that the contract of insurance was perfected, in the State of Virginia, and the policy of this com-

pany was delivered to the insured in the City of Charlottesville, Virginia, on or about the 15th day of March, 1904.

On the 7th day of the following September, the said J. Samuel McCue was placed under arrest at his home, in the City of Charlottesville, Virginia, charged with the murder of his wife, and though protesting his innocence, was incarcerated in the public jail of that city.

On the date of maturity of his note for \$427.50, namely, September 15th, 1904, and while in jail, no trial having been had, and still protesting his innocence, this note was paid by McCue's check to Cary, at Richmond, Va., who held it, together with that of Carroll and Fitzgerald as collateral security.

On the 5th day of November, 1904, McCue was convicted of murder in the first degree, and on the 9th day of November, 1904, was sentenced to be hanged on the 20th day of January, 1905.

He applied to the Supreme Court of Appeals of Virginia for an appeal, and the same was refused; he then asked for a rehearing which was likewise refused for reasons given at length by that Court, and on the 10th day of February, 1905, he was "hanged by the neck until he was dead," all of which will appear from the record in this cause, and in the reported case of *Commonwealth vs. McCue*, 103 Va., 870.

On the 20th day of February, 1905, just ten days after the hanging, his brothers qualified as executors of his will, and on the same day made oath to the proof of loss filed with this insurance company. They stated therein that the insured had met his death, not from disease or other natural cause, but by hanging on the 10th day of February, 1905. The medical doctor filed as part of the proof of McCue's death a sworn statement that he died on the above date after an "illness of eighteen minutes duration," and not from any disease, but from suffocation "by hanging." The executors also swore in said proof that they were legally entitled to receive the entire amount payable on the policy, "having qualified as executors and given bond required by law." The claim was declined by the company on the ground that the death of the insured by hanging under sentence of a court of justice annulled the contract of insurance. It, however, offered to return the \$427.50 paid for the said contract, and did subsequently deposit that

sum in the Treasury of the Circuit Court for the Western District of Virginia.

It further appears that McCue left a will, dated the 10th day of September, 1904, a copy of which is contained in the record, by which will he disposed of all his insurance money.

On the 29th day of September, 1905, J. William McCue and Ruby G. McCue, infant children of J. Samuel McCue, by Marshall Dinwiddie, their next friend, instituted a certain suit in chancery in the Corporation Court of the City of Charlottesville, in the State of Virginia, against the plaintiff-in-error, the Northwestern Mutual Life Insurance Company and others, and on the same day filed their bill in equity in the said cause, and issued an attachment under the statute of the State of Virginia against the Northwestern Mutual Life Insurance Company. Although the policy was payable to McCue's estate, and his executors filed proof of claim and swore that they were entitled to the insurance money, this suit was instituted in the name of the children of the insured, and the executors were made parties defendant. The probable purpose of this procedure was to prevent the cause being removed to the United States Courts, because some parties plaintiff and defendants were citizens of the same State. This, however, under the subsequent agreed rearrangement of the parties became immaterial (See Judgment of Circuit Court, record, p. 70). Subsequent thereto, and in due and proper time, the Northwestern Mutual Life Insurance Company filed its petition upon the ground of diverse citizenship for the removal of the said cause from the Corporation Court of the City of Charlottesville, in the State of Virginia, to the Circuit Court of the United States, for the Western District of Virginia. The said petition for removal being proper in form and substance, the said cause was duly removed to the Circuit Court of the United States for the Western District of Virginia, and on the first day of January, 1906, the Northwestern Mutual Life Insurance Company filed its demurrer to the bill of the said complainants, and on the same day filed its answer thereto. Subsequently, the facts were, by stipulation of counsel, agreed to and made part of the record herein, and by agreement of counsel the parties, complainant and respondent, were rearranged by the Court, proper parties were made plaintiff and proper parties defendant, and a jury

waived, so that on the argument of the cause nothing was before the Court except a determination of the cause upon its merits (Record, p. 70). While the suit was one in equity, it had for its sole object the recovery of \$15,000 of insurance money from this insurance company upon its policy number 576,576. This is apparent from a reading of the bill, and, upon the subsequent re-arrangement by the Court of the parties plaintiff and defendant, no other question was left for the Court's decision, it being a concession between counsel that they desired simply a determination of the question whether or not there could be, under the law, a recovery of the insurance money where the insured died upon the gallows for wife murder (Record, p. 101).

On November 15th, 1906, the cause was argued before the Circuit Court, and, on November 24th, 1906, the court rendered its opinion, through Judge HENRY C. McDOWELL, sustaining, in all respects, the contentions of the Northwestern Mutual Life Insurance Company, and the judgment of the court thereon was entered on the same day (Record, pp. 64-70). On March 1st, 1907, J. William McCue and others filed their petition for a writ of error, together with their assignments of errors, and on March 27th, 1907, an order was entered by the Circuit Court allowing the said writ of error, and, proper bond having been given, the cause was appealed to the United States Circuit Court of Appeals for the Fourth Circuit. On the fourth day of February, 1908, the cause was argued in the said court before the Honorable JETER C. PRITCHARD, Circuit Judge, and ALSTON G. DAYTON and EDMUND WADDILL, JR., District Judges, and on the fifth day of November, 1908, the said Court, through District Judge DAYTON, rendered its opinion reversing the Circuit Court for the Western District of Virginia, from which opinion District Judge WADDILL, dissented (Record, pp. 109-119. Also Federal Reporter, Vol. 167, p. 435). On the fourteenth day of December, 1908, the Northwestern Mutual Life Insurance Company filed its petition for a re-hearing, and on the seventeenth day of May, 1909, the same was denied, the court failing to deliver any further opinion (Record, pp. 121-138). On May 19th, 1909, an order was entered by the Circuit Court of Appeals staying its mandate pending an applica-

tion to this Court for a writ of *certiorari*, providing such application was presented to the Court on or before October 5th, 1909. The said application was duly presented, and the said writ of *certiorari* granted on October 18th, 1909.

ARGUMENT.

In order to set forth properly the errors of the Circuit Court of Appeals, it is necessary to consider briefly the contentions in this case.

On behalf of the Northwestern Mutual Life Insurance Company, it was contended that this case was identical in principle, and parallel in fact, with that of *Burt vs. The Union Central Life Insurance Company*, decided by this Court in 187 U. S., 362, the only distinguishable fact between the two being that McCue before his execution admitted the justice of his sentence, while in the *Burt* case it was contended that there was a miscarriage of justice; that it was controlled by the principles annunciated by the House of Lords in the similar case of *Amicable Society vs. Boland* (known as *Fauntleroy's case*), 4 Bligh, N. S. 194, and in the analogous decisions of *Ritter vs. Mutual Life Insurance Company*, 169 U. S., 139, *Hatch vs. Mutual Life Insurance Company*, 120 Mass., 550, *Wells, Admr., vs. New England Mutual Life Insurance Company*, 191 Pa., 207, 43 Atl., 126, and various other cases, holding that death resulting from a violation of the law was not such a contingency as was contemplated in or covered by a contract of insurance, in other words, death on the gallows was an uninsurable risk, and hence there could be no recovery in such a case, regardless of whether the policy of insurance contained any stipulation with reference thereto. Counsel for the McCue estate seemed to recognize the force of the rule laid down in the *Burt* case, although they attempted at great length to distinguish it from the present case, and so, resorted to the argument that the contract of insurance was a special Wisconsin contract, and in construing it, the Circuit Court of Appeals was compelled to follow the laws of Wisconsin, and could not regard it as a general contract to be controlled by the commercial law of the land as in the *Ritter* and *Burt* cases.

In reply to this contention, the Northwestern urged that the policy was not a special Wisconsin contract, but a general, ordinary contract of insurance made in Virginia and not in Wisconsin, but, regardless, of the State where made, to be construed by the general commercial law of the land as applied by this court in the Burt and Ritter cases. And further, that if the laws of Wisconsin were to control, then, there was nothing in them authorizing a recovery in this case.

We here adopt our brief filed in support of the petition for the writ of *certiorari* and reproduce the same with paging corrected to conform to the record as filed in this Court:

The facts show the existence of an ordinary policy of insurance in a mutual life insurance company, issued upon an application made in Virginia, where the first premium was paid and the policy delivered, upon the life of a man who, admitting the justice of his sentence, paid the penalty for the murder of his wife, by death upon the gallows. The policy contained no provision covering death resulting from a violation of the law. The application, which was made part of the policy, did contain restrictions concerning the occupation and travels of the insured, and also this provision "or shall within one year from the date of said policy, whether sane or insane, die by my own hand, then and in every such case, any policy issued on this application shall be null and void." The question thus fairly and squarely presented for the decision of the Circuit Court of Appeals was identically the same considered and decided by this Court in

Burt vs. Union Central Life Insurance Co., 187 U. S., 362, namely:

Can There Be a Recovery on a Life Insurance Policy Where the Insured is Legally Executed, the Policy Being Silent on the Subject.

The Circuit Court of Appeals, while conceding that this question must be answered in the negative if Burt's case applied, decided that it did not apply, because it held the contract involved to be a Wisconsin contract, made in pursuance of special concessions in the company's charter contained and to be construed according to the laws of that State and not to be a general contract of insurance, such as the policy in

Burt's case, to be construed according to the general commercial law of the United States.

The facts in the case at bar were conceded to be substantially the same as, or even stronger than, those in Burt's case, but relying, as aforesaid, on some particular language in the charter of the Northwestern, the court found ground for distinguishing it from the rulings of this Court in the Burt case above referred to.

In reaching this conclusion, it is earnestly contended that the court committed the errors assigned in the petition for the writ of *certiorari*, namely :

FIRST.

The court erred in holding that the policy of insurance in this case was a Wisconsin contract instead of a Virginia contract.

SECOND.

The Court erred in holding that the policy of insurance was not a contract to be construed by the general commercial law of the country, as enforced in the courts of the United States, regardless of the laws of the State where it was made.

THIRD.

In holding that the laws of Wisconsin authorized a recovery in this case.

The Court is assured that the plaintiff-in-error is not controlled in the relief here sought by the amount involved in this case, but by the sincere belief that the errors assigned, if not corrected, will establish for the Fourth Judicial Circuit rules not only different from those prescribed by this Court in the following cases :

Burt vs. Union Central Life Insurance Company,
187 U. S., 362 ;

Ritter vs. Mutual Life Insurance Co., 169 U. S.,
130 ;

Mutual Life Ins. Co. vs. Hill, 193 U. S., 55 ;

and other cases hereinafter cited, but different from those pre-

vailing in the other circuits of the Union, all of which will result in great confusion in the construction of thousands of insurance policies, life, fire, marine and accident, involving millions of dollars.

We allude especially to the finding of the court that the policy of insurance in this case was a "special" Wisconsin contract governed by the laws of that State, and not to be construed by the general commercial law enforced by the United States courts in cases of insurance contracts generally. A condition, we repeat, which in operation would result in countless policies of insurance outstanding in this country being construed by the United States courts in accordance with the laws of the forty-eight states to which the several companies may owe their charters, instead of by the single rule of the commercial law announced by this Court in an unbroken line of decisions.

Various insurance companies have for years sought to evade the laws of the States in which they may be doing business by a provision in the policy declaring that it is a contract to be construed by the law of the State where the company was chartered. But in spite of such a provision the Federal courts have uniformly held that such policies were contracts of the State where the application was made and the premium paid by and the policy delivered to the insured, and were to be construed by the general commercial law. In a word, the rule is that although the policy may contain a provision that it is to be considered as a contract of the home State and governed by the laws of such State, still such a provision will not prevail against the laws and policy of the State where the contract is actually made by the payment of the premium and the delivery of the policy, and its interpretation and construction will be controlled by the general commercial law of the United States regardless of the State where made.

All other questions involved in this suit become of minor importance as compared with this far-reaching one. The opinion of the Circuit Court of Appeals at page 111 *et seq.*, concedes that if the general commercial law applies then, under the case of

Burt vs. Union Central Life Insurance Company,
187 U. S., 362,

the judgment of the Circuit Court is correct and cannot be dis-

turbed. This, therefore, is stated by the Court to be the crucial question.

In its printed opinion at page 117 of the record, the Court says :

“ It therefore becomes important for us to determine first whether this insurance policy was a Wisconsin contract or simply a commercial one, and, second, whether the rule of public policy in Wisconsin, if there be any, is contrary to that enunciated by the Supreme Court.”

It then proceeds to hold it to be a contract not enforceable under the general commercial law, but a special Wisconsin contract enforceable according to the laws of that State. It cites, however, no authority for this conclusion, but its reasons are stated at pages 117 and 118 as follows :

“ The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that State, which distinctly defines its power and obligations. This act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those ‘ who shall hereafter insure with the said corporation and also their heirs, executors, administrators and assigns * * * shall thereby become members thereof during the period they shall remain insured.’ It gives to them, under conditions expressly set forth, the right to vote for and elect its trustees and officers ; to become such trustees and officers ; to sue said corporation and be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualifications of witnesses in any such suits ; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies. In addition to this the policy on its face shows it was executed at the office of the company in Wisconsin and by its express terms was made payable there. This being true, the conclusion is inevitable.

This contract must be held to be a Wisconsin one, to be construed according to its laws.”

It will be observed that the Court does not state *where the application was made nor where the first premium was paid, nor where the policy was delivered, nor does it make any allusion to the express provision of the policy that it should not become a contract until the first premium was actually paid by the insured. Yet these several acts have been expressly held by this Court as fixing conclusively the place where the contract was made.*

Mutual Life Insurance Company vs. Hill, 193 U. S., 551.

One of the syllabi of that case in stating the propositions established by prior decisions of this Court says :

“The State where the application is made, the first premium paid by and the policy delivered to the assured, is the place of contract.”

and the late Justice BREWER in adopting that proposition for the case before the Court cites :

Equitable Life Assurance Society vs. Clements, 140 U. S., 226.

Mutual Life Insurance Company of New York vs. Cohen, 179 U. S., 262.

in support of it.

It is therefore confidently urged that :

The Policy Was Not a Wisconsin Contract But a Virginia Contract, Because the Application Was Made, the Premium Paid, and the Policy Delivered in Virginia.

The Agreed facts in this case, show that the application was made by McCue at Charlottesville, Virginia, February 25th, 1904, and that the policy was delivered to him at Charlottesville, Virginia, on March 15th, 1904, when he gave his note for the premium which note was payable at said City of Charlottesville, in Virginia, and actually paid there by the checks of McCue given in the said City September 14th and 15th, 1904. See pages 114, 115 and 116 of the printed record.

The above facts having been agreed, make it a concession in this case.

In addition to this, the policy itself provided as follows :

“This policy shall not take effect until the first premium shall have been actually paid.”

It so happens that this very provision of the policy of this company has been construed by one of the Circuit Courts of the United States. We allude to the case of

Northwestern Mutual Life Insurance Co. vs. Elliott, 5 Fed., 225, 228,

wherein the court, holding the policy to be an Oregon and not a Wisconsin contract, says as follows :

"Where then was this contract made: in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract binding upon the parties.

"The premium was paid to the agent of the plaintiff at Portland (Oregon), who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And, until it was binding upon the company, it was not binding on the applicant; in short it was not yet a contract, but only a proposition."

See, also, Supreme Lodge, Knights of Pythias vs. Meyer, 198 U. S., 508.

In a word, the policy and charter involved in this case differ in no legal or essential features from those in

Ritter's Case, 169 U. S., 139.

In the policy of the Union Central Life Insurance Company, issued to the assured in Burt's case, the following provision occurs :

"This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page thereof which are made a part of this contract, *which contract shall be held and construed to have been made in the City of Cincinnati, Ohio*" (Transcript Record, Burt's case, p. 6).

In spite of this express provision declaring the contract to be an Ohio contract, the Supreme Court in deciding the case applies the rule of the general commercial law, and not that of Ohio.

We are therefore justified with confidence to urge upon the

court a consideration of the first point made by us; namely *that it is a Virginia contract and not a Wisconsin contract, and is to be construed by the general commercial law of the land as laid down by this Court in Burt's case, and others, regardless of the laws of the State where made.*

It needs no argument to establish the principle that a policy of insurance is a contract, whether it be Fire, Life, Marine, Accident or Personal Liability, and therefore is in all respects and in all its phases to be treated and construed as any other contract. The following authorities so hold:

"Life insurance imports a mutual agreement
* * *"

Ritter vs. Mutual Life Ins. Co., 169 U. S., 139.

The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.

New York Life Insurance Co. vs. Cravens, 178 U. S., 389. (See syllabi.)

St. Johns vs. the Amer. Mut. Life Ins. Co., 13 N. Y., 31-38.

Rosenplanter vs. Provident Sav. Life Assur. Soc., 96 Fed., 721.

It is a general rule that all contracts are made where the last acts are performed to make them binding. The reasons above quoted given by the court for its conclusion that the contract here was a Wisconsin contract do not mention those final acts, also above cited, which are necessary to make the contract between McCue and the Northwestern Mutual Life Insurance Company a binding contract. On the contrary, the Court bases its conclusion on the following:

A. The defendant is a Wisconsin corporation.

B. Being a mutual company, its members acquire certain rights not enumerated in the policy.

C. Policy shows on its face that it was executed in Wisconsin.

D. By express terms made payable in Wisconsin.

The provisions of this policy thus referred to by the Court are identically the same in most instances and substantially

such in all respects as those contained in the ordinary life policies of the mutual companies of all the States. The charter of the Northwestern Mutual Life Insurance Company and its policy in this case differ in no legal essentials from that of the Mutual Life Insurance Company of New York, which was involved in Ritter's case, 169 U. S., 139, and that of the Union Central Insurance Company in Burt's case, 187 U. S., 362.

Reference to the charter of the Mutual Life in the Ritter case (see Acts of the Legislature of the State of New York of April 12th, 1842, also charter of Mutual Life Insurance Company in "Charters of American Life Insurance Companies," published by the Spectator Company of New York, edition of 1906, p. 174, etc.), shows that its provisions are identical with those of the Northwestern Mutual. Indeed the latter was manifestly taken literally from the former. This is not surprising since the Mutual Life was chartered in 1842 and may be regarded as the parent Mutual Life Company in this country, while the Northwestern was not chartered until 1857. The provisions in the charter of the Northwestern Mutual quoted and relied on in the opinion of the Court, pages 117, 118, are taken literally from that of the Mutual Life as follows :

CHARTER OF NORTHWESTERN
MUTUAL.

SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess and convey shall :

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, admin-

CHARTER OF MUTUAL LIFE
INSURANCE COMPANY OF
NEW YORK.

SECTION 2. * * * The corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities.

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be :

SECTION 3. (*Members.*)—All persons who shall hereafter insure with the said corporation, and also their heirs, ex-

istrators and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation and no longer.

centors, administrators and assigns, continuing to be insured in the said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by said corporation, and no longer.

For a further and complete comparison of these charters see Record, page 125.

These provisions are for all legal purposes identical and repel the idea that the policy on McCue's life constituted a special contract of Wisconsin not within the general commercial law applied to the Ritter policy.

Every corporation chartered by any State is a citizen of that State, but we submit there is no rule of law which holds that when a corporation, for instance of California, completes a contract in Maine it is a California contract simply because one of the parties to it is a citizen of California. The Northwestern Mutual Life Insurance Company, one of the parties to this contract, is a citizen of Wisconsin. McCue, the other party to the contract, was a citizen of Virginia. The reasoning of the Court, we think, is erroneous in selecting the domicile of the Insurance Company rather than that of McCue as determining where the contract was made. It may be, as the Court says, that McCue obtained certain rights not mentioned in the policy, but is this not equally true of every policy holder in other companies? In this respect it in no wise differs from the insured in Ritter's case, which involved a mutual company. This, we submit, cannot make a contract finally made by a corporation in a State other than its domicile, a contract of its home State. If this is not true, then a Virginia corporation could embody in its charter or by-laws a provision to the effect that "All contracts entered into by this corporation, wheresoever they may be finally completed, shall be Virginia contracts," and thus in disregard of the law of the State where the contract is made and it is doing business, carry with it the laws of its own home State and force the same upon the citizens of the State where it is permitted as a foreign corporation to do business. Certainly the

Court could not have considered such a consequence in reaching its conclusion.

We respectfully suggest that further argument on this point to show that this was a Virginia contract and not a Wisconsin contract is not necessary, in view of the express ruling of the Supreme Court of the United States in

Mutual Life Ins. Co. vs. Hill, 193 U. S., 551.

The policy in that case was issued by a mutual life insurance company in behalf of George D. Hill, at Seattle, in the State of Washington, upon a written application made by him in that State and sent to the home office of the company, in New York, was accepted by the company and a policy signed by it in its home office in the State of New York, and forwarded to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. In that case the children of the decedent were the beneficiaries, and the money was made payable in the event of death at the home office of the company in New York. The very same facts or conditions existed in that case as are mentioned in the Court's opinion as existing in this, namely:

A. The defendant company was a New York corporation "owing its life to a special Act of the Legislature of that State."

B. It was a mutual company of which the insured, by the act of insurance, became a member entitled to rights and privileges not enumerated in the policy.

C. The policy on its face showed that it was executed at the office of the company in New York.

D. By its express terms was made payable in the City and State of New York.

The parallelism between the case at bar and Hill's case being absolutely perfect in all legal essentials, except that in Hill's case there was an express provision in the policy that "*The contract of insurance when made shall be held and considered at all times and places to have been made in the City of New York.*" There is no such provision in the policy in this case. Yet, notwithstanding such a provision in the Hill case the court held that the policy was made at Seattle, in the State of Washington, and was therefore a Washington contract. The case at bar is therefore very much stronger, be-

cause had there been in McCue's policy a provision that it was a contract made in Wisconsin to be controlled by the laws of Wisconsin, and had there been among the laws of that State one expressly allowing a recovery in the event that McCue should die on the gallows for murder, that law being contrary to the public policy as announced in Burt's case, and, as we will presently see, in the State of Virginia, it could not, under the ruling in the Hill case, be held to be a Wisconsin contract and a recovery allowed under it.

It must be manifest, therefore, upon a careful reading of that case, and Clements' and Cohen's cases cited by Justice BREWER, that the reasons assigned by the Circuit Court of Appeals for making the McCue policy a Wisconsin contract are not sufficient, and therefore that court erred in so holding.

Many decisions, both State and Federal, appropriate in support of the point being discussed could be cited and quotations made.

We, however, refer the Court to only a few, as follows :

Mutual Life vs. Cohen, 179 U. S., 262,
where the late Justice BREWER says, at page 264 :

"The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana (The Mutual Life is a N. Y. Corp.). *Under those circumstances under the general rule, the contract was a Montana contract and governed by the laws of that State.* Equitable Life Assurance Society v. Clements, 140 U. S., 226, 232." (Italics ours).

In Hicks vs. National Life Ins. Co., 60 Fed., 690, the insurance company was a Vermont corporation, the insured was a citizen of New Jersey, the premiums were paid in New York. Judge WALLACE, in speaking for the Circuit Court of Appeals, says, at page 692 :

"If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premium paid there, is a New York contract, *notwithstanding it is signed and issued by the insurer in another State*, the reference is supplied by the case of Assurance Soc. vs. Clements, 140 U. S., 226 ; 11 Sup. Ct., 822." (Italics ours).

25 Cyc., p. 748, says :

"The State where the policy is finally delivered by the agent of the company to the assured who there pays the premiums, delivery and payment of premium being essential to the final execution and taking effect of the contract, is the State in which the contract is made and by the laws of which it is to be construed, in the absence of any special provision to the contrary."

There is no provision to the contrary in this case :

In *Minor on the Conflict of Laws*, the author at page 399, speaking of the *locus celebrationis* of an insurance policy, says :

"Again, the payment of the first premium is often by the terms of the agreement, made the event upon which the policy is to become binding. In such case, the place where the premium is paid is the *locus celebrationis* of the insurance contract."

The same principle has been cited and followed in the following cases :

Cravins vs. N. Y. Life Ins. Co., 148 Mo., 600; 71 Am. St. Rep., 637; 50 S. W., 519.

Wall vs. Equitable Life Assur. Soc., 32 Fed., 273 (opinion by the late Justice BREWER, of this Court).

Mutual, etc., Co. vs. Robinson, 54 Fed., 580.

Equitable Life Ins. Co. vs. Winning, 58 Fed., 541.

McMaster vs. N. Y., etc., Co., 78 Fed., 33, 37.

Assurance Society vs. Clements, 140 U. S., 226.

This brings us to the second point, namely, that the Court erred

In Holding that it was not a Contract to be Construed by the General Commercial Law of the Country as Enforced by the Federal Courts Regardless of the State where it was Made.

We have partially discussed this point already because it was necessarily involved in some of the cases referred to in support of the first proposition.

On all questions of general commercial law, such as contracts and especially insurance contracts, the Federal courts follow their own rules. This has been the unvarying interpretation of the Federal Judiciary Act from its enactment, and it is nowhere better expressed than by Justice STORY in

Swift vs. Tyson, 16 Peters, 1, 18,

where he says :

" But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. * * * Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

The same ruling is followed in :

Oates vs. First Nat. Bank, 100 U. S., 239, 246.

Railroad Co. vs. Lockwood, 17 Wall, 357.

Manhattan Life Ins. Co. vs. Broughton, 109 U. S., 121.

Pleasant Township vs. Aetna Life Ins. Co., 138 U. S., 67.

Lake Shore, etc., R. Co. vs. Prentice, 147 U. S., 101, 106.

It only remains, therefore, to enquire whether the construction of a policy of insurance is a contract coming within the general commercial law. And here again we find no confusion or contrariety in the decisions of this Court, but a unanimous line of authorities.

In *Carpenter vs. The Providence Ins. Co.*, 16 Pet., 495, Justice STORY says, at Page 511 :

"The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Washburn & Moen Mfg. Co. vs. Reliance Marine Ins. Co.*, 106 Fed., 116-7; Affirmed in 179 U. S., 1 :

The late Chief-Justice FULLER says at Page 14 :

"It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that Commonwealth (*Kettell vs. Alliance Ins. Co.*, 10 Gray, 144; *Mayo vs. India Mut. Ins. Co.*, 152 Mass., 172).

"Even if this were absolutely so, we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. *The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the State decision as in matters of purely local law*" (Italics ours).

The Barnstable, 181 U. S., 464, 470 :

"*As the construction of a policy of insurance is one of general rather than one of local law* (*Liverpool and Great*

Western Steam Co. vs. Phoenix Ins. Co., 129 U. S., 397, 443; Gloucester Ins. Co. vs. Younger, 2 Curt., 322), we are constrained to adopt our own views as to such construction, though the Courts of the State in which the cause of action arose have adopted a different law" (*Italics ours*).

It follows, therefore, from what has been said, that this contract and questions arising under it ought to be construed under the general commercial law, which being true, the law of Wisconsin was in no way controlling upon the court, even though it should hold that the contract of insurance was a Wisconsin contract,—a proposition which to our minds is untenable in view of the express declaration of Chief-Justice FULLER in Washburn & Moen Manufacturing Co. vs. Reliance Insurance Co. and Mutual Life vs. Hill, *supra*.

It is now axiomatic in the law that an insurance company chartered by one State cannot do business in another except with the permission of the latter and subject to the terms, conditions and laws of the State in which it may so seek to do business. When the Northwestern Mutual Life Insurance Company came to Virginia and took McCue's application, received his first premium and delivered to him the policy in this suit, it became bound by the insurance laws and the public policy of Virginia as fully as if it had been incorporated by that State. More than this, for the purposes of its Virginia business, it ceased to be subject to the Wisconsin laws in conflict with those of Virginia.

McCue's policy could not be a special Wisconsin contract to be construed by any law or policy of that State inconsistent with those of Virginia and the general commercial law.

"That Missouri could forbid life insurance companies of other States from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted in view of the decisions of this court."

Northwestern Nat'l Life Ins. Co. vs. Riggs, 203 U. S., 255.

See also Mutual Life vs. Cohen, *supra*.

The Circuit Court of Appeals after holding that the contract was a Wisconsin contract, declined to interpret it under

the general commercial law, but instead followed a Wisconsin case, which, as it said, established a rule of public policy for that State conclusive of this contract. The act incorporating the defendant company the Court says at page 118 of the record "did not limit the power to assume life risks, but expressly gave power to assume all and every such. We would simply be indulging in judicial legislation for the State of Wisconsin if we should add to this act 'except those arising from suicide or hanging.'"

If this last statement be sound, then the Courts of Massachusetts, New York and other states have done the same thing in similar cases, and this Court has likewise indulged in judicial legislation in the Ritter case and in the Burt case.

To assume "all risks" means all insurable risks, and the reason that death by hanging is not included in the same part of the policy which prohibits the insured engaging in hazardous enterprises, is because the latter are insurable risks in no way *contra bonos mores*, while the former is an uninsurable risk, one which, even if written in the policy, would not allow a recovery, since it has been declared by the House of Lords and this Court to be violative of good conscience and sound public policy.

All corporations have by their charter the express or implied power to enter into any and all contracts in connection with their business, but this does not mean that they may enter into *ultra vires* contracts or those illegal *per se* or those *contra bonos mores*, nor does it mean that, if they enter into such contracts, that they will be upheld by the Courts. So, the right to assume all insurance risks does not mean to assume an illegal risk.

The Court, quoting from Section 3 of the charter of the Northwestern Mutual Life (record, p. 118), as follows—

"The corporation hereby created shall have the power to insure the lives of its respective members and to make all and every risk appertaining to or connected with life risks and to grant and purchase annuities"—

concludes, therefore, that it has the power to insure against death by hanging and death by suicide. This provision is

almost identical with that contained in the charters of all the large insurance companies operating in the United States.

See "Charters of American Life Insurance Companies," *supra*.

The charter provisions of the Mutual Life gives that company :

"The power to insure their respective lives and to make all and every insurance appertaining to or connected with life risks and to grant and purchase annuities."

The charter of the Equitable Life Insurance Society of the United States states that its business :

"Shall be to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith."

The charter of the Life Insurance Company of Virginia, granted by the Legislature of that State, states that its purpose is to carry :

"On the business of insurance on lives and to make all and every insurance appertaining thereto or connected therewith."

The charter of the Maryland Life Insurance Company, granted by the Legislature of that State, enacts :

"That the business of the said corporation shall be to make insurance on the lives of individuals and accidents by travel and every insurance appertaining thereto or connected with such risks and to grant, purchase or dispose of annuities."

The charter of the New York Life Insurance Company, granted it by the Legislature of that State, says :

"The business of the company shall be insurance on lives and all and every insurance pertaining to life."

These quotations show clearly that the charters of other insurance companies, both stock and mutual, which have

been passed upon by state courts, by the circuit courts and the Supreme Court contain provisions almost identical with that of this company, and therefore there is nothing peculiar in the charter of this company which gives the assured any rights or privileges different from those of the policyholder in any of the other insurance companies above named. In none of the cases against the Mutual, Equitable Life and others whose charters are above quoted has it been held that the power to insure lives and to make all and every insurance appertaining to or connected with life risks, includes the power to insure against death in violation of law, or death upon the gallows.

What we have said makes it unnecessary to discuss the supposed public policy of Wisconsin, because under the rule laid down in *Mutual Life vs. Hill*, even had there been in that State a statute declaring that in the event that McCue should die on the gallows, that this defendant company could not set it up as a defense ; that statute would have been inoperative upon a contract made in a State where the public policy was in conflict with it, as is the case in Virginia. The rule in Virginia is laid down by a unanimous court in the case of *Plunkett vs. Heptasophs*, 105 Va., 643, where in affirming the opinion of the Circuit Court which denied a recovery in the case of a suicide, KEITH, P., after quoting from Burt's case, Ritter's case and Fauntleroy's case, says, at page 650 :

" We think the authorities cited fully vindicate the opinion and judgment of the Circuit Court and it is affirmed."

Third Assignment of Error.

In Holding That the Laws of Wisconsin Authorized a Recovery in this Case.

In reaching the conclusion involved in this assignment, the Circuit Court of Appeals relied on the case of *Patterson vs. National, etc , Insurance Co.*, 100 Wisconsin, 118, 42 L. R. A. 253, which case the court states establishes the public policy for Wisconsin. We respectfully insist that this case does

not tolerate such a conclusion. The Wisconsin Court there says :

" Nor would the application of that principle to this case necessarily conflict with the Ritter case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured."

This to our mind shows that the Wisconsin Court recognized a clear distinction between that class of cases where the policy is made payable to a third party who has acquired some valuable interest therein, and cases like the Ritter case and the present case where it is payable to the estate of the assured. Indeed the Court says that its decision does not conflict with that in the Ritter case. This distinction is stated by the Court when it declines to say what the law would be in a case like the present one.

" Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us."

We submit that the court erred in holding that the cases of *Patterson vs. Life Insurance Company*, 100 Wisconsin, and *McCoy vs. Northwestern Relief Association*, 92 Wisconsin, 577, 66 Northwestern 697, which were cases of suicide, are in any way analogous to cases involving death in consequence of crime, for the reason that in Wisconsin suicide is not a crime and the court in the opinion in the *Patterson* case laid special stress upon that fact. Consequently, one who committed suicide did not violate the law of Wisconsin and therefore there was no question of the public policy of that State involved in the decision in the *Patterson* case.

In the Circuit Court of Appeals reference to *Whitfield vs. Aetna Life Insurance Co.*, 205 U. S., 489 (p. 115 of record), it says :

" By this decision it seems to us we reach bed rock in this matter."

Again we submit that this case is in no way contrary to the rule laid down in *Equitable Life vs. Clement*, *supra*, and the other cases following it. On the contrary, it is in all respects a confirmation of the views expressed in that case and in the case of *Hill vs. The Mutual Life Insurance Co.*, 193 U. S., 551. The defendant in error, a Connecticut corporation, issued its accident policy upon the life of James Whitfield, a resident of Missouri. There was a Missouri statute which declared that insurance companies doing business in that State could not make the defense that the insured committed suicide, while the policy contained a provision that in the event of suicide the insured should recover one-tenth of the principal amount. In order to give effect to this Missouri statute it was necessary for the Court to reach the same conclusion that was reached in the *Hill* case, namely, that the contract of insurance was a Missouri contract and that the statute of Missouri prevailed over any provision contained in the policy, and the reason that the contract was a Missouri contract is the same as that stated in *Equitable Life vs. Clements*, namely, the premium was paid and the policy delivered in the State of Missouri. For statement of facts see 144 Fed., 356. If there is any analogy between the *Whitfield* case and the present case it would simply result in compelling this Court to follow any statute of Virginia which would bear upon the right of recovery in this case, and in Virginia there is no such statute. In view of the *Whitfield* case, it cannot be denied that a State may adopt a public policy applicable to foreign insurance companies doing business in it, but the Circuit Court of Appeals in its opinion has overlooked the all-important fact that the *public policy* applied in that case was not the public policy of Connecticut, the home of the insurance company, but the public policy of Missouri, in which State the contract of insurance was consummated, and where the insured resided. Applying this case to that at bar, it follows that McCue's policy having been paid for and delivered in Virginia was a Virginia contract, and the public policy and laws of Virginia, and not those of Wisconsin controlled it.

Death at the Hands of the Law.

The foregoing discussion, we think, shows clearly that the Circuit Court of Appeals erred in the manner above contended for. As we read its decision, it does not, in any way, attempt to overrule this Court's conclusion in the Burt case, but holds that it does not apply. It is said by the Circuit Court of Appeals in its opinion (record, p. 115) :

“ And we must go a step further and say that in the case of such contracts general in character and governed by the rules of commercial law, we must, regardless of state decisions, in view of the decision of the Supreme Court in the Burt case, hold that a policy of life insurance ‘ does not insure against the legal execution of the insured for crime.’ ”

As we construe this, the question of whether a recovery can be had where the insured meets his death at the hands of the law, is not before this Court upon this appeal, except upon the theory that the defendants in error will ask this Court to reverse its decision in the Burt case. In view, however, of the efforts of counsel for the defendant-in-error in the courts below, both in oral and written argument, to distinguish the present case, or failing in that, to show that the Burt case was improperly decided, it may not be amiss to review briefly the principles which deny the right of recovery in a case like Burt's case and the present one.

In the brief of the defendant-in-error in the Circuit Court of Appeals the proposition was announced in the following words :

Can There Be a Recovery On a Life Insurance Policy Where the Insured Is Legally Executed, the Policy Being Silent on the Subject ?

The answer is emphatically No, and for two well defined and clearly established reasons.

First. Death on the gallows was not one of the risks against which McCue was insured.

Second. Even if it had been a risk specially contracted

for, a recovery under such circumstances would be contrary to public policy.

Amicable Society vs. Bolland, 4 Bligh, N. S., 194.

Burt vs. Union Central Ins. Co., 187 U. S., 362, 365.

Ritter vs. Mutual Life Ins. Co., 169 U. S., 139.

Considering now the nature of a life insurance contract, we find it announced by CRIPPEN, J., in *St. John's vs. The Amer. Mut. Life Ins. Co.*, 13 N. Y., 31, 38, that :

"An insurance upon the life of an individual is a contract by which the insurer for a certain sum of money or premium proportioned to the age, health, profession and other circumstances of the person whose life is insured, engages that if such person shall *die* within the period limited in the policy, the insurer shall pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted. The risk of the insurer is the death of the person whose life is the object of the security."

The insurer, in making his contract, takes into consideration the age of the applicant, his physical conditions, surroundings, antecedents, and any and all facts bearing on the risk, *i. e.*, which would tend to hasten the death of the applicant. Much of this information necessarily comes from the applicant himself, and the insurer is compelled to rely largely on the statements given him. With this information in hand, the insurer is prepared to calculate the probable duration of the applicant's life (in order to fix the rate of premium), and this is done with the expectation and implied agreement that the insured will live in the future the same manner of life that he has done in the past, *i. e.*, he will do nothing to hasten his death, or, as Mr. Justice BREWER says in the case of *Burt vs. Union Central Life Insurance Co.*, 187 U. S., pp. 362, 365 :

"There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy."

The insured takes the chance of paying premiums for the remainder of his life (or whatever the period of the policy

may be) or of dying from natural causes after the first premium has been paid.

The risk of dying may be compared to the perils of the sea in marine insurance; or the dangers of conflagration in fire insurance.

If a ship were insured against the perils of the sea and the owner scuttled her—would there be any moral or legal obligation on the insured to pay? If a house is insured against fire, and the insured commits arson, is there any moral or legal obligation on the insurer to pay? On principle then, why should there be any difference in life insurance, when the insured himself by a crime brings about the event on which the payment of the policy becomes consummated? In the former case the insured is not allowed to profit by his wrong in scuttling the ship, or his crime of arson, following still the analogy, should he be allowed to make a profit for himself—or his beneficiaries, as the direct result of his own illegal act?

This analogy is recognized and applied by this court in the Ritter case, through the late Mr. Justice HARLAN speaking for the unanimous court. *Ritter vs. Mutual Life Insurance Company*, 169 U. S., 139, 151.

And in the same case the principle is elaborated as follows:

“Life Insurance imports a mutual agreement whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury (*Vicksburgh & Meridian Railroad v. Putnam*, 118 U. S., 545, 554). If a person should apply for a policy expressly providing

that the company should pay the sum named if or in the event that the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, *but only death occurring in the ordinary course of his life.*"

To permit a recovery when death has resulted from "a violation of law" is contrary to public policy. In the case of *Hatch vs. Mutual Life*, reported in 120 Mass., page 550, the insured died from the effects of an operation (abortion) submitted to by her.

The court, after reviewing the facts, decides it entirely on the ground of *public policy*—nothing being said as to the provisions of the insurance policy.

"We are of opinion that no recovery can be had in this case, because the act on the part of the insured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences, for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth (See *Amicable Society vs. Bolland*, 4 Bligh, N. S., 194; *Horn vs. Anglo-Australian Assurance Co.*, 30 L. J. (N. S.), Ch. 511; *Moore vs. Woolsey*, 4 E. & B., 243.)"

That case is followed in

George A. Wells, Admr. vs. New Eng. Mut. Life Ins. Co., 191 Pa., 207; 43 Atl., 126.

In which case the insured voluntarily submitted to an operation for abortion. *Hatch vs. Mutual Life* is cited with approval, the court saying:

"We see no reason to question the soundness of this proposition, and it has our approval. * * *

The act was also highly immoral and illegal, as well on her part as on the part of the person who performed the operation, and, therefore, it would be contrary to public policy to permit a recovery. Upon the whole case, it was the plain duty of the court below to direct a verdict for the defendant."

See also :

Murray vs. N. Y. Life Ins. Co., 96 N. Y., 614; 48 Am. Rep., 658.
 Bloom vs. Franklin Life Ins. Co., 97 Ind., 478; 49 Am. Rep., 469, and cases cited, *supra*.

Taking up the question of

Death at the Hands of Justice,

we find the case of

Amicable Society vs. Bolland, 4 Bligh, N. S., 194 (Eng. reprints, Vol. 5, p. 70, known as Fauntleroy's case),

to be exactly in point. The opinion is brief and merits quoting in its entirety as follows :

"THE LORD CHANCELLOR: The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May, in the same year, he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824, he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the Respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

"The question, under these circumstances, is this: whether the assignees can recover against the Insurance Company the amount of this insurance; that is to say, whether a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted and finally executed, whether, under such circumstances, the parties representing him, and claiming, under him, can recover the sum insured in the policy so effected. I

attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went at least altogether void?

"Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the Respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed. Judgment reversed."

It was argued at some length by the defendants-in-error, in the Courts below, that the controlling factor in that case was the doctrine of forfeiture and attainder, then in force in England. We have examined the case with care, but can find no basis for such an argument. On the contrary, the Lord Chancellor says :

"Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the respondents are not entitled to recover."

The case of *Cleave vs. Mutual, etc., Life Asso.*, 1 Q. B. D. (1892), 147, is cited by counsel for the McCue heirs in an effort to show that the rule of public policy established for England in *Fauntleroy's* case has been modified or abrogated. An examination of the case shows that such is not a fact. On the contrary, the rule is emphasized. The Master of Rolls says :

"Any one claiming through the wife (*i. e.*, Mrs. Maybrick, the murderess) is shut out by the rule of public policy. * * *"

And in the same case, *Fry, L. J.*, says :

"In a word, I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternate or independent rights."

It is not possible to argue that the children of McCue are not "claiming under" him. A statement to the contrary is, on its face, a contradiction. The policy, it is true, is payable to McCue's estate, but his estate was solvent without the \$15,000 sought to be recovered in this case (record, p. 77). By his will (record, p. 79), his entire estate is devised to his children. Whether they claim as devisees or heirs is immaterial. Their right to make claim could only arise through the insurance policy upon the death of their father.

The case of *Burt vs. Union Central Life Insurance Company*, 187 U. S., 362, is, we believe, a case as nearly identical in facts and principles with the case at bar as it is possible for two cases to be. The opinion delivered by the late Mr. Justice BREWER in no uncertain language, speaking for the unanimous court, is so conclusive of our contentions that we refrain from quoting at length from the case, as it must be one familiar to this Court.

The latest expression from this Court upon a kindred principle is in reference to the case of *Maner vs. The Penn Mutual Life Insurance Company of Philadelphia*, recently decided in the United States Circuit Court of Appeals for the Fifth Circuit. Unfortunately, no opinion was rendered by the Court. The principle involved is similar to that under discussion here, namely, whether or not there could be a recovery

where the insured died as the result of his violation of the law; where he was killed in a fight begun by himself. The Circuit Court of Appeals denied the right of recovery, and this Court denied a writ of *certiorari* to that Court (See 216 U. S., 622).

The writ in the Maner case was denied since the granting of the writ in this case.

Summary.

The insurance policy on McCue's life was not a Wisconsin contract, but a Virginia contract.

Mutual Life Ins. Co. vs. Hill, 193 U. S., 551.

The law of Virginia prohibits a recovery in a case like this.

Plunkett vs. Supreme Conclave, etc., 105 Va., 643.

Regardless of the State where the contract of insurance is made, the general commercial law is applied in the courts of the United States.

Swift vs. Tyson, 16 Peters, 18.

The construction of an insurance policy is one of general commercial law.

Washburn & Moen Mfg. Co. vs. Reliance, etc., Ins. Co., 179 U. S., 1.

The Barnstable, 184 U. S., 464, 470.

The public policy of Wisconsin is immaterial, but there is no public policy regarding this case, as the cases referred to by the Circuit Court of Appeals involve the question of suicide, and as suicide is not a crime, no law of Wisconsin was violated by the assured in the cases referred to.

The Supreme Court of Wisconsin has never construed the charter of this company. The construction put upon it by the Circuit Court of Appeals was its own and not that of the Courts of the State from which the company derived its powers.

The courts of the United States and England deny the right of recovery in behalf of an insured who died on the

gallows in expiation of a crime, regardless of the terms of the policy.

Burt vs. Union Central Life Ins. Co., 187 U. S., 362.

Amicable Society vs. Bolland, 4 Bligh, N. S., 194.

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

WILLIAM H. WHITE,

WILLIAM H. WHITE, JR.,

Counsel for Northwestern Mutual Life Insurance Company.

GEORGE H. NOYES,

JOHN R. DYER,

of Counsel.

Office Supreme Court, U. S.
FILED.

DEC 19 1911

JAMES H. McKENNEY,
CLERK.

No. 138.

IN THE
Supreme Court of the United States

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

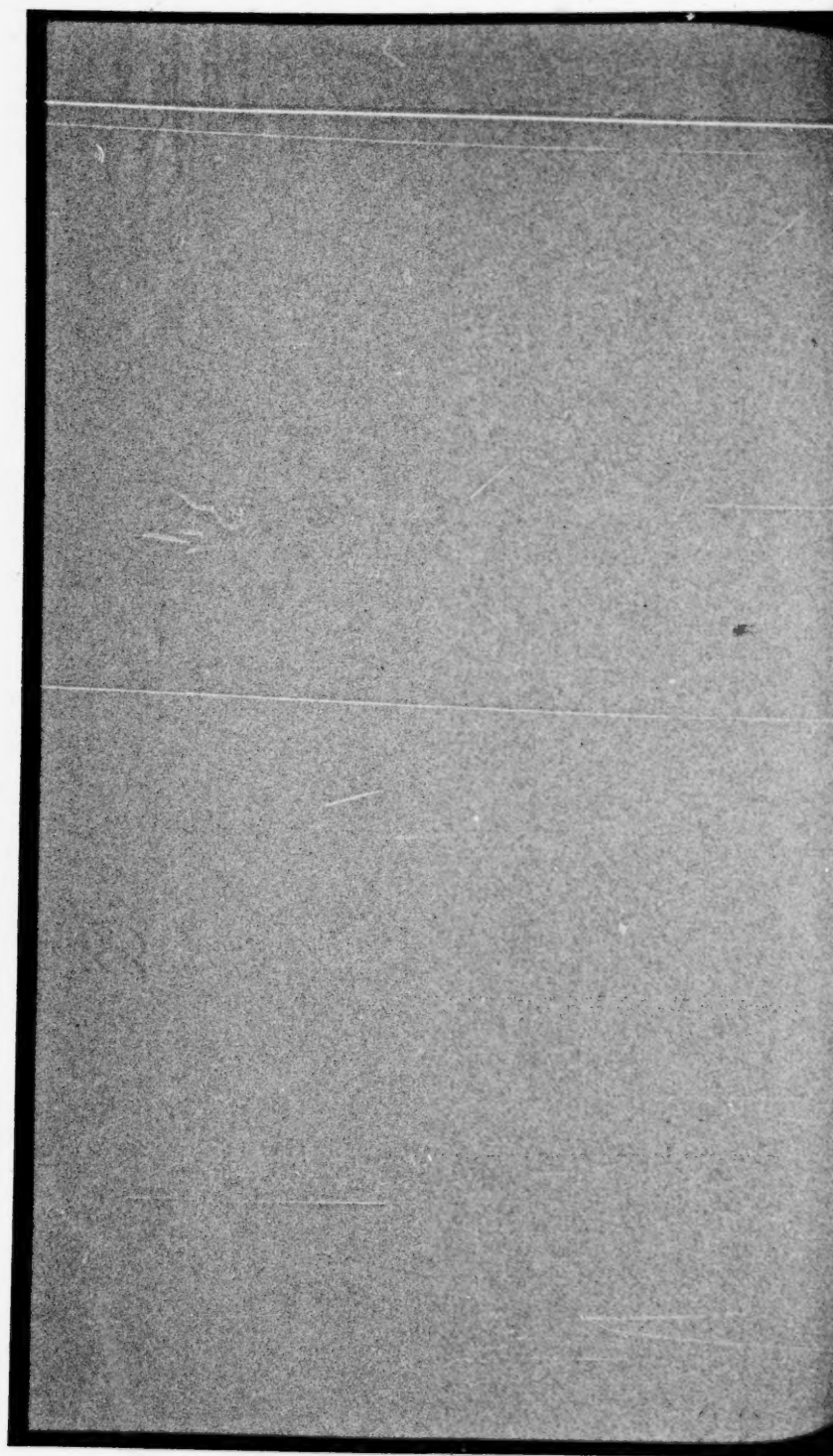
v.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, AND RUBY G. McCUE, by Marshall Dinwiddie,
their next friend, et al.

No. 138.

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

On Writ of Certiorari to the United States Circuit Court of
Appeals, for the Fourth Circuit.



IN THE
Supreme Court of the United States

No. 338.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE,
AND RUBY G. McCUE, by Marshall Dinwiddie,
their next friend, et al.

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.
On Writ of Certiorari to the United States Circuit Court of
Appeals, for the Fourth Circuit.

Statement.

On the 10th day of February, 1905, James S. McCue was hung. At the time of his death a policy of insurance for \$15,000.00, issued to him, a citizen of Virginia by the Northwestern Mutual Life Insurance Company on his life, was in force. This company is a Mutual Insurance Company, with surplus assets, incorporated by special statute of the State of Wisconsin. The legislative acts of Wisconsin gave the Com-

pany unlimited power to insure the lives of its members, and to make ail and every insurance appertaining to or connected with life risks.

We quote from the opinion of the Circuit Court of Appeals as to the scope of this legislation:

"This Act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those 'who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns * * * shall thereby become members thereof during the period they shall remain insured.' It gives them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and officers; to sue said corporation and to be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualification of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies."

The policy recited that in consideration of certain premiums the company bound itself, if the death of James S. McCue occurred within a period of ten years from the date of the policy, to pay to such beneficiary or beneficiaries of said James S. McCue, as might be nominated under that contract the amount of the insurance and further provided that if the insured should survive the beneficiary so named, then payment to be made to the executors, administrators or assigns of the insured. The application designated "my estate" as the person for whose benefit the insurance was desired.

The application was made in Charlottesville, Va., but the policy was made payable in Milwaukee, Wisconsin, and it was likewise delivered in Milwaukee. The policy states:

"In witness whereof, The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this fifteenth day of March, one thousand nine hundred and four."

It was likewise provided as follows:

"This policy shall not take effect until the first premium shall have been actually paid while the assured is in good health."

On the date of the delivery of the policy, March 15, 1904, the assured gave his note for the premium, \$427.50, to Carroll & Fitzgerald, agents, who solicited the policy, payable to their order. They endorsed the note to T. A. Cary, the general agent in Virginia of the Company, with memorandum attached that the note was to be held in Mr. Cary's office, and not used in bank, and McCue was to be notified about thirty days before due. These soliciting agents gave their individual note to Mr. Cary for \$427.50, on which he advanced the money to the Company and held these notes for collection, with McCue's note attached as collateral.

The agreed statement of facts contains the following stipulation (Printed Record, p. 78):

"The Company, at its home office at Milwaukee, received the whole amount of premiums, viz. \$427.50, in cash from Cary May 2, 1904, and had no knowledge of the note arrangement between McCue and Carroll & Fitzgerald and Cary."

McCue paid his note in September, 1904, after he was arrested and lodged in jail. Upon this evidence the Circuit Court made the following finding (p. 68 and p. 69):

"The payment by Mr. Cary, long before the murder, completed the contract; absolved the insured from any liability to the Company for this premium, and left Cary, personally, the creditor of the insured."

The whole premium which was paid was, after the suit was instituted, paid into court by the Insurance Company.

This suit was instituted in the Corporation Court of Charlottesville, Va., as a foreign attachment in equity against the Northwestern Mutual Life Insurance Company, with the People's National Bank of Charlottesville, as garnishee, said bank having in its possession estate of the insurance company. The case was removed on the petition of the insurance company, defendant, to the Circuit Court of the United States for the Western District of Virginia. The Virginia statute under which the bill was filed is found in Virginia Code, § 2964, so much thereof as is material is as follows:

"When a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, or to damages for the breach of any contract, express or implied, if such claim exceed twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim, on affidavit made by himself, his agent or attorney, according to the nature of the case, conforming as nearly as its nature will admit, to the affidavit required by section twenty-nine hundred and fifty-nine; * * * any attachment under this section shall be executed in the same manner, and shall have the same effect as in law, but the proceedings therein shall be the same as in other suits in equity."

The bill was filed by the children of McCue as plaintiffs and his executors were made defendants. It being questioned whether this was properly a suit in equity or an action at law, a jury was waived and it was agreed by counsel, as they were interested only in securing a speedy trial on the merits, the mere misarrangement or misjoinder of parties would not be objected to and that either or both, the executors or the children, might be considered as parties plaintiff.

The Circuit Court was of opinion that this case was ruled by *Burt v. Union Central L. Ins. Co.*, 187 U. S. 372, and dismissed the bill, except that it allowed plaintiffs a part of the money paid into Court.

The Circuit Court of Appeals reversed the judgment of the

Circuit Court and allowed a recovery against the Company. To this judgment a writ of certiorari has issued.

Argument.

In discussing the principles involved in this case, we shall adopt the following order of presentation.

I. The contract is not void as against public policy.

A. Generally, the considerations which govern in the enforcement of public policy by the courts.

The application of these essentials to this case.

B. The law governing the obligation of this contract does not avoid it.

(1) The inquiry in the federal courts is not general, independent of any specific law; but specific as to the law of the state of the obligation.

(2) The determination of the law of a state in the federal courts.

(a) In matters of general commercial law or general jurisprudence, the decisions of state tribunals are of great authority, although the court exercises an independent judgment.

(b) In the enforcement of statutes or the construction of statutes, the federal courts make no extrinsic inquiry.

(c) In questions of policy, the statutes and decisions of the state are controlling.

(3) The law of this obligation is the law of Wisconsin.

(a) There is the place of execution of the contract and there is the place of payment of the first premium and there is the place of performance.

(b) The stipulations of fact in the record and the findings of the lower courts.

- (4) The law of Wisconsin does not avoid this contract.
 - (a) Its statutes authorize it.
 - (b) The decisions support it.
- II. The right asserted is a property right vested by the special statute of incorporation which is not divested by crime.
 - A. The charter controls the rights of members, irrespective of the place where such rights may have been acquired.
 - B. The charter vests a property right.
 - C. The charter provides for devolution on death.
 - D. Where the law provides a method of devolution of property, that method controls and the courts do not inquire further as to the effect of the statutory course.
- III. Death on the gallows is not impliedly excepted from risks undertaken.
 - A. Public policy does not except it.
 - B. The policy covers the risk.
 - (1) Face of policy covers all risks.
 - (2) The canon of construction, *expressio unius*, forbids a construction excepting this risk.
 - (3) The company has been paid to undertake the risk.
- IV. If the McCue estate cannot recover, the innocent parties interested will be admitted as claimants.
- V. The cases cited do not militate against recovery on the principles above set out.
- I. The contract upon which this suit has been brought is not void as against public policy.**
 - A. Generally, the considerations which govern in the enforcement of public policy in the avoidance of private contracts.**

Let us inquire—What is this public policy which will avoid contracts? “Public policy” is one of the convenient phrases which may mean one thing or another, according to the bias of the person appealing to it and the temperament of the court deciding it. It is difficult to authoritatively determine what is, or is not, public policy. Certain it is, however, that it is not to be applied except where prejudice to the public interest clearly appears, and it is equally certain that it changes with the times and with the modes of thought of any given period.

Following are expressions of the English courts concerning public policy:

In quaint language Burroughs, J., in *Richardson v. Mellish*, 2 Bing. 229-252, says,

“I, for one, contest, as my Lord has done, against arguing too strongly upon public policy. It is an unruly horse, and when you once get astride of it you never know where it may carry you. It may lead you from sound law; it is never argued at all but when all other points fail.”

Quoted and approved in *Davies v. Davies*, 36 Ch. Div. 364.

Lord Bramwell in *Steamship Co. v. McGregor* (1892), App. Cas. 25, 45, said:

“I quote from a distinguished judge (Cave, J.): ‘Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are to be more trusted as interpreters of the law than expounders of what is called public policy.’”

The danger to be encountered when courts cease to be interpreters of what law is, and become expounders of what they think it ought to be, is illustrated by the expression of Lord Campbell, in *Ramboll v. Soojumnul*, 6 Moore, P. C., 310. After stating that the common law of England permitted an action to be maintained on a wager, although the parties had

no previous interest in the question on which it is laid and expresses his regret that such had been the law, he adds:

"I look with almost shame on the subterfuges and contrivances and infusions to which judges in England long resorted in struggling against this rule."

In *Printing & Numerical Registering Co. v. Sampson*, L. R. 19, Eq. 465, it is said:

"'It must not be forgotten,' it was once said by an English judge, 'that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contracts.'"

In the case of *Moore v. Woolsey*, 4 E. & B. Q. B. 243 (82 E. C. L.), Lord Campbell, C. J., said:

"When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee."

To the same effect are the expressions of courts in leading American cases. In *Smith v. DuBose*, 78 Ga. 413, 6 Am. St. Rep. 260, it is said by the court that the legal conception of public policy is liable in different jurisdictions and at different times and at different epochs to great variations. Continuing, the court speaks as follows:

"Judicial tribunals are themselves bound to the observances of rules of extreme precaution when invoked to declare a

transaction void on grounds of public policy; and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing the transaction void on this account."

In *Richmond v. Dubuque R. R. Co.*, 26 Ia. 190, it is said that:

"The power of the courts to declare a contract void for being in contravention of public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

And after laying down, in terms somewhat different, the same rule, it is said by *Howe, J.*, of the Supreme Court of Wisconsin, in pronouncing the judgment of the court on *Kellogg v. Larkin*, 3 Pinn. 123, 56 Am. Dec. 164-168:

"He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the State."

So in *Swann v. Swann*, 21 Fed. Rep. 299, determined in the United States Circuit Court for the Eastern District of Arkansas, it is said by *Caldwell, J.*, delivering the opinion:

"The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of the State, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people are not to be indulged in."

In the leading case of *Richardson v. Mallish*, *supra*, the observance of the rule, as thus limited, is strongly upheld and rigidly enforced by the whole court. Each of the judges presiding in that case delivered separate opinions, though all concurred in the result.

Best, C. J., after stating that the courts have frequently

gone much further than they were warranted in going in questions of public policy, adds:

"Let that doubtful question of policy be settled by that high tribunal, namely, the Legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true, broad principles."

In *Equitable L. Co. v. Waring* (117 Ga. 599), 97 Am. St. Rep. 177, 191, it is said, quoting from *Richmond v. Dubuque Co.*, *supra*, that the power of courts in this respect was like the power to declare a statute unconstitutional, and added:

"The power of the law-making body to interfere with the private right of contract has its limits, and certainly the courts should be extremely cautious in supervising private contracts when the law-making power has not declared them unlawful."

In the *Homestead* case, 22 Gratt. 301, the Virginia Supreme Court of Appeals uses this language:

"The inviolability of contracts, public and private, is the foundation of all social progress, and the cornerstone of all forms of civilized society, where an enlightened system of jurisprudence prevails."

Following are some of the expressions of the United States Courts:

Chief Justice Chase, in *License Tax* case, 5 Wall. 462, says:

"This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort, must, in general be addressed to the Legislature. Questions of policy determined there are concluded here. There are cases it is true, in which arguments drawn from public policy have large influence, but these are cases in which the course of legislation and administration do not leave any doubt

upon the question what the public policy is, and in which what would otherwise be of obscure or doubtful interpretation may be cleared and resolved by reference to what is already received and established."

In *Vidal v. Girard's Exors.*, 2 How. 128, the court quotes from *Pierce v. Randolph*, 12 Tex. 200, as follows:

"It is the duty of both judge and juries to decide on rights according to the laws of the land, and not on their belief as to what ought to be the law. Their office is not legislative; it is judicial; it is to administer the law, and not exalt their own beliefs or notions about the law, and follow them as a higher code by which the rights of the community are to be regulated and controlled."

It is, as the discussion will later show, especially important to inquire how far under the law of Wisconsin, public policy can be permitted to affect private contracts.

In *Kellogg v. Larkin*, *supra*, the Supreme Court of Wisconsin quotes Story as follows:

"Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down, that whenever any contract conflicts with the morals of the times, and contravenes any established interests of society, it is void, as being against public policy."

After showing that the Legislature is the best exponent of what is public policy, the courts add:

"I by no means intend to deny the rights or propriety of judicially determining that a contract which is actually at war with any established interests of society is void, however individuals may suffer thereby, because the interests of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which had been made in good faith stipulating for nothing that is *malum in se*, nothing that is made

malum prohibitum, to be void as controverting the policy of the State, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematic. And I submit that he is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the State."

In *Houlton v. Nichols*, 96 Wis. 393, 57 Am. St. Rep. 928, it is said:

"The principal question here presented is, was the contract entered into between the plaintiff and the defendant void as against public policy? And this turns on whether it embraces by its terms or by necessary implication an agreement to do an illegal act, or that such was its tendency. If by its terms or by necessary implication, the agreement stipulated for corrupt action or solicitation in the nature of lobbying, or tended directly to such results, then it is void."

On page 932 the opinion uses this language:

"The test is, does the contract, by its terms or necessary implication, require the performance of acts of a corrupt character or which have a corrupting tendency? Obviously, when the learned judge in *Tool Co. v. Norris*, 2 Wall. 45, so often quoted and approved, said that the law looks to the tendency of such agreements, and closes the doors of the courts to them, and that their invalidity turns, not on whether improper influences are intended, but upon their corrupting tendency, he referred to agreements to do acts in themselves contrary to public policy, or agreements the performance of which, by necessary inference required or contemplated the resort to methods having a corrupting tendency; that is all."

Again on page 930:

"As was very truly said by Sir George Jessel, M. R., in *Printing, etc., Co. v. Sampson*, L. R., 19 Eq. 462: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void

as being against public policy, because if there is one thing which more than another public policy requires, it is men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.' This means no more, we take it, than that it should be made to appear clearly, that is, beyond reasonable controversy, that the contract is void, as contrary to law and sound morals, else it should be sustained."

The factors which must be present in a case, that the court should hold it void as against public policy, may be stated as follows:

Opinions as to what is public policy varies from time to time. Courts are careful not to encroach unduly upon the liberty of contract. Contracts are not interfered with except where they clearly appear to be prejudicial to the public interest. No contract will be interfered with unless it embraces by its terms or necessary implication an agreement to do an act which is illegal or which has a corrupting tendency.

Applying these principles to the case at bar it is not supposable that any person can seriously believe that, if a life policy is paid in case of death by hanging, it has a tendency to encourage murder in order to mature the policy by being hung. It would be just as reasonable to argue that life insurance would encourage the dissemination of contagious diseases by tending to encourage contracting small-pox or yellow fever as a means of death. We may safely assume that in the present state of public opinion life insurance does not encourage people to be hung.

If benefit in one's heirs or next of kin by reason of death is an encouragement to crime to accomplish death, then the laws of descent and the statutes abolishing attainder are equally incentives to crime. If a contract to pay one's heirs

on death is subversive of public policy as encouraging crime, so are the statutes abolishing attainder present a violation by the legislature of sound policy in legislation. But it is not argued to-day by anyone that the law of attainder operated to the good of the community or that its abolition has produced any evil effects. The benefit in heirs by execution of the ancestor cannot be said to be subversive of public interest.

In *Moore v. Woolsey*, 4 E. & B. I. B. 243, s. c., 82 E. C. L., Lord Campbell, C. J., in holding that an assignee of an assured who had committed suicide could recover, aptly contrasts the inducement under such circumstances with the validity of a remainder after a life estate. He says:

"The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives."

It is equally plain that there is nothing in this contract which in terms or by necessary implication amounts to an agreement to do an illegal act, or which requires the performance of such an act. If the policy were payable upon the sole condition of death by hanging, there might be some plausibility in such a contention. But even then it would not be conclusive, for people when insuring their lives do not promise to die in any certain manner or at any certain time. Else a short term life policy, payable on condition of death in ten years, would be considered an agreement to die in that time, or a policy payable if a party should die while engaged in an unlawful enterprise, would be held an agreement for such unlawful act. But such is universally held not to be the case. Life insurance merely affords a provision against the chance of death and is not an agreement to die.

It is not necessary, however, to go this far because this policy is silent as to the means of death (except that death by suicide within one year from date of policy is expressly excepted). Certainly there is nothing on the face of it which

would render it void. The contract, therefore, was lawful in its object and was valid and binding in its inception. Certain it is that death by hanging was not actually in the minds of either party when the policy was issued.

"Where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated by the contract, in the performance of something to be done on his part." Per Lord Tenderden, C. J., in *Wethrell v. Jones*, 3 Barn and Adolph, 221.

Waugh v. Morris, 42 L. J. Q. B. 57, M. D. 4, 151, is to the same effect.

A charter party was made in France stipulating that the ship should load a cargo of hay and proceed to London. The agent of the charterer told the master that the consignees would require the hay to be delivered at a particular wharf which he promised to do; on arriving in the Thames he was informed that by an order of the Council of London made under the contagious disease act it was not legal to land in London hay brought from France. The ordinance was in existence when the charter party was entered into, but neither of the parties knew it, nor did the ship owner contemplate a violation of the law. The charterer after a time exported the hay and the ship owner brought an action against him to recover damages for detention of the ship. Held, that when a contract is to do a thing which cannot be performed without a violation of the law, it is void; but in order to avoid a contract which may be legally performed on the ground there was intention to enforce it in an illegal manner, it is necessary to show a wicked intention to break the law.

In *Brier v. Dozier* (Va.), 24 Gratt. I, this question came before the Virginia Court of Appeals. The question was: Assuming that the defendant was engaged in an unlawful act of running the blockade with tobacco during the late war, the plaintiff stored for him this tobacco upon a contract to

indemnify him against loss arising from that act. In consequence of storing this tobacco plaintiff's property was burned by the Union Army. Action on the indemnity contract. The question was, does the maxim *ex turpi causa non oritur actio* apply. Held, plaintiff can recover. The court said:

"We know very well that to make a contract unlawful as being against law or public policy it must be manifestly and directly so; and it is not enough that the contract is connected with some violation of the law however remotely or indirectly."

In *McDonald v. Triple Alliance*, 57 Mo. Ap. 87, the opinion cites with approval *Fitch v. Ins. Co.*, 59 N. Y. 557, and *Mills v. Rebstock*, 29 Minn. 380, suicide cases, in which it was held that the beneficiaries were not bound by any act of the assured after the policy was taken out, unless such act was in violation of some condition of the policy.

The distinction is this, that a contract is void when its direct object is the performance of an illegal act, the consideration being that the act shall be done.

The question as to contracts supposed to create an interest adverse to morals or public policy, was much considered in *Ramboll v. Soojumnull*, 6 Moore's P. C. C. 30 (*supra*). Opinion by Lord Campbell held that, even though the contract to a certain degree might create a temptation to do what was wrong, it was not to be presumed that the parties would commit a crime and "if the parties were not induced by it to commit a crime, neither the interest of individuals or of the government could be affected by it and we cannot say that it is contrary to public policy."

There being no agreement express or implied to do an illegal act, and the contract not having induced the parties to commit a crime, no interest is prejudiced by it and there would seem to be no sound principle on which it could be avoided, and we must conclude that unless there is a frank and honest belief,—or rather we may say, under the authorities, unless it clearly appears—that the possession of a life insurance

policy has a tendency to induce the commission of murder by the party whose life is insured, there can be no sound principle on which the risk in this case should not be paid. No one, we take it, seriously entertains such a belief.

So much for the general view as to the effect of this contract on the public interest.

B. The law governing the obligation of this contract does not avoid it.

(1) The inquiry in the federal courts is not general, independent of any specific law, but specific as to the law of the state of the obligation.

Whether or not this contract is valid or is to be held void must be determined by the law of the state creating the obligation. We shall find that the validity of this contract is to be determined by the law of Wisconsin. But first it is proper to discuss the contention of counsel for appellant that the federal courts in cases relating to the rights and obligations of insurance policies have no concern with state law. It is said that the federal courts adopt a law which is wholly independent of the law of any state, but is a separate body of law called "general commercial law" and therefore the inquiry of the Circuit Court of Appeals as to the public policy of Wisconsin was wholly immaterial to this case.

In this contention, that any inquiry as to the law of Wisconsin relative to contracts of this character is improper, counsel have mistaken the scope of the rulings of this court that in cases involving questions of general commercial law or general jurisprudence, the federal courts are not bound by state decisions but exercise an independent judgment. We shall discuss later in this brief whether or not the question involved in this case is one to which this ruling is applicable and is not one essentially local. But it is first important to consider whether or not an inquiry into state law is relevant.

The rule that in matters of general commercial law or general jurisprudence, federal courts are not bound by state de-

cisions, is doubtless well settled and we have no desire to question its logic or propriety.

But the application which counsel for defendant seeks to give it is hardly warranted.

Law is the mandate of a sovereign and the only sovereignties here concerned are of the separate states. Contention of counsel that legislative enactment cannot affect the judgment of a federal court on this obligation, that this contract is governed only by general commercial law, amounts to saying either that the obligation is governed by no law, raised by no sovereignty or that there is a peculiar independent body of law, the federal common law. The first proposition is unthinkable—an obligation can exist only by reason of law. The second proposition is untrue. There is no federal common law separate and apart from the law of the different state administered by the federal courts. The federal courts sit as courts of the state in which they are sitting and administer law as do the state courts. They exercise a jurisdiction concurrent with that of the state courts and in the exercise of that jurisdiction they decide the rights of the parties arising out of a given transaction upon their own interpretation of the law governing it. But the fact that federal courts are not bound by state decisions as to what is the effect of the law enforced, upon a given transaction, does not mean that any different law governs a transaction because a remedy is given in the federal courts. It simply means that a federal court is as well qualified to interpret and enforce the law governing a particular transaction as is a state court. The federal court is and must be interpreting and enforcing the law of some particular state.

The cases cited in the briefs of defendants' counsel clearly recognize these principles. In *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 106 Fed. 116, 117, which was cited by counsel for appellant in their brief, p. 12, in the Circuit Court of Appeals, Putman, J., says:

"This was, undoubtedly, a Massachusetts contract. It was

delivered in this State by the agent of the defendant company, and, clearly, it is within *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Cit. 822, 35 L. Ed. 497. So far, therefore, as any local usages which have become a part of the subject-matter of under-writing marine risks in Massachusetts are concerned, this court would be bound to adopt the law as established by the decisions of the State Court, yet, so far as a question comes up which is not one of mere local usage, but of general law, or a question of the interpretation of a commercial instrument, like a policy of insurance, although what we are seeking to discover is, of course, the law in Massachusetts, yet, nevertheless, we are not governed by the decisions of the courts of Massachusetts, but by those of the Supreme Court of the United States, so far as we can find decisions bearing on the questions involved, and, so far as we do not find them, by the general trend of authority."

And this rule and its scope has been repeatedly defined by this court and lower federal courts.

Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508. Question as to constitutionality of a state law requiring engineers to obtain license before running engine.

Held, State had right to regulate the conduct of its citizens and unless it directly affected interstate commerce or contravened an act of Congress, such regulation was not unconstitutional. Lack of legislation by Congress is evidence that state law is to govern.

"There is no common law of the United States in the sense of a natural customary law distinct from the common law of England as adopted by the several states each for itself applied as its local law and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 105. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstances that the courts of the United States in cases within their jurisdiction where they are called upon to

administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *N. Y. Central v. Lockwood*, 17 Wall. 357, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence receives a different interpretation from that placed upon it by the judicial tribunals of the state, but the law applied was none the less the law of that state."

Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055. Question whether certain supreme court reports which had been copyrighted, though defectively, in Pennsylvania, were exclusive property of assignee of proprietor, so that he could enjoin publication. It was contended this was common law right.

Held, whether or not proprietor has property in published book must be tested by common law of Pennsylvania.

"It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its own local usages, customs and common law. There is no principle which pervades the Union and has the authority of law which is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration as the copyright was entered in the clerk's office of the district of Pennsylvania, etc., we must inquire if the common law as to copyrights, if any existed, was adopted in Pennsylvania."

Bucher v. Cheshire R. R. Co., 125 U. S. 555, 31 L. Ed. 795. Plaintiff sued for negligent injury received on Sunday. Massachusetts court had repeatedly held that under these circumstances there can be recovery. Question whether federal court was required to follow those decisions.

Held: "There is no common law of the United States and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England and established by the laws of the different states. When, therefore, in an ordinary trial we speak of the common law we refer to the law of the state as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the state courts in reference to this law and defining which is the law of the state as modified by opinions of its own courts by statutes of the state and the customs and habits of the people that the trouble arises. It may be said generally that whenever the decisions of the state courts relate to some law of a local character which may have become established by these courts or has always been a part of the law of the state that the decisions upon the subject are usually conclusive and always entitled to highest respect of the federal courts."

Hudson Furniture Co. *v.* Harding, 17 C. C. A. 203, 30 L. R. A. 513. Action to recover on a note signed by a corporation with defendants' signature on the back. Defendants had had no notice of protest. Note was signed in Wisconsin, delivered and payable in Massachusetts. Massachusetts had a statute which required that parties on the back of a note should have notice in the same manner as endorsers. Under federal decisions joint makers did not have to be given notice. Question how far federal court was bound by that statute.

Held: "It is urged, however, that we must disregard this statute and in support of this contention the broad doctrine is asserted that the several states of this Union have no right by statute to change the general commercial law. This contention is rested upon certain observations in *Swift v. Tyson* and *Watson v. Tarply*, 15 L. Ed. 509. * * * The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving a state of power to legislate with respect to the law merchant. It presents a bold and far reaching proposition striking at the root of power in respective states

to which we are not prepared to yield assent. We are referred to no provision of the constitution which expressly or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct and independent from the law of the states. Whence came it and how was it adopted? Was it the common law of England or the civil law of the continent? Was it a law appropriated by the nation upon the adoption of the constitution? It must then be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state, at least, is governed by the civil law. And we know, moreover, that the commercial law existing in these various states while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States except possibly as the common law of England has been adopted with reference to the construction of powers granted to the federal union * * * quoting from *Smith v. Ala.* * * * We are of opinion that these principles are not shaken by the obiter dicta to which reference has been made. It will thus be seen that in the exercise of the concurrent jurisdiction of the federal court with respect to all contracts not within the exclusive control of the federal government, we administer the law of the state which controls the contract and that each state has the right to impose such conditions and limitations upon contracts not inhibited by the terms of its own or the federal constitution as it may seem proper. It is of course most desirable that there should be uniformity of laws with respect to commercial paper—a necessity becoming more and more emphasized day by day and which may possibly result in the grant of exclusive control of the subject to the federal government. It is not, however, our province to bring about such result however desirable. We are constrained to hold that the act of Massachusetts here in question was a valid exercise of power and became a term of this contract.”

Hence defendants were not liable because they had not been given proper notice of protest.

Chic. M. & St. P. Ry. Co. v. Solan (1897), 169 U. S. 133, 42 L. Ed. 688. Question whether a contract limiting liability for personal injuries to \$500 was valid defense.

Held: "The question of the right of the railroad corporation to contract for exemption from liability for its own negligence is indeed like other questions affecting its liability as common carrier of goods or passengers one of those questions not merely of local law but of commercial law or general jurisprudence upon which this court in the absence of express statute regulating the subject, will exercise its own judgment uncontrolled by decisions of the state in which the action arises. But the law to be applied is none the less the law of the state and may be changed by the legislation except so far as restrained by the constitution of the state or by the constitution or laws of the United States."

Gatton v. Chi. R. I. & P. Ry. Co. (Iowa), 28 L. R. A. 556. Question whether discrimination in interstate shipments was illegal in the absence of any regulation by congress. Held, there is no national common law to govern such shipments and as congress is given exclusive control, regulation by state law, whether at common law or statutory, is impossible. In holding that there is no national common law, the court says:

"It is clear that prior to the Revolutionary war the common law was in force in all of the colonies. Each colony, subject to certain restrictions and limitations, determined its own system of municipal law. Each adopted so much of the common law of England as it deemed suited to the wants and necessities of its people. * * * The common law, then, existed in this country prior to the Declaration of Independence, but it was not a national common law. It was the local law of each colony. They had not yet formed a new nation. Now, when, if at all, did this common law which had become the heritage of the colonists cease to be applicable to the colonies severally, or

when did it take on its national character? Surely, not by the Act of Independence, which made the colonies 'free and independent states.' The mere fact of the emerging of the colonies from their colonial condition into that of independent states did not ingraft the common law, which had been severally adopted by the colonies, into a general system of national law. * * *

"Counsel contend that the common law of the several states is 'one entire body or system of law, and its rules and principles are the same,' no matter in what state they may be administered. If it be true that the rules and principles of the common law are the same in all the states,—a proposition which we think is hardly true,—still it is certain that the same common law is differently construed in different state jurisdictions. Thus, in one state it may be held that the common law did not permit discriminations, and, in another, that it did. Hence it is that we find the federal courts, in certain cases, some of which we have cited, holding that in determining what the common law, as enacted, adopted or recognized by the state, is, they will not be bound by the interpretation given thereto by the state courts. Again, it is undeniable that in any state in which the common law may be in force the legislature may alter it, or set it aside.

"We incline to the opinion that in nearly all of the cases relied upon, the common law which is referred to in the decisions of the United States courts is that common law adopted by the several states and that the federal courts in determining questions of general character of national importance, will not feel bound to follow the construction of the common law which may have been adopted by the courts of the several states, but will give it their own construction. In such cases, however, they are not administering a national common law, but only that adopted and recognized by the several states. In this view it may well be 'that the courts of the United States administer the common law in many cases.' Cooley Constitutional Limitations, page 30. So they do, but it is the common law as existing in the several states."

Tranportation Co. v. Parkersburg, 107 U. S. 691. Bill to restrain collection of certain wharfage authorized by a city

ordinance of defendant on the ground that such was unconstitutional as being a tax on tonnage. Held, it does not appear that this is a tax on tonnage. Absence of federal regulations in this case does not indicate that local regulation is improper. Whether or not such regulation is unreasonable is to be determined by the law of West Virginia.

"It is an undoubted rule of universal application that wharfage for the use of all public wharves must be reasonable. But then the question arises: By what law is this rule established and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, extortionate? There can be but one answer to these questions. Clearly, it must be by the local municipal law, at least until some superior or paramount law has been prescribed. At Parkersburg, it is the law of West Virginia. The rule referred to is a rule of the common law undoubtedly; but it has force in West Virginia because the common law is the law of that state, and not because it is the law of the United States. The courts of the United States do not enforce the common law in municipal matters in the States because it is federal law, but because it is the law of the State."

McClaine v. Prov. L. Ins. Soc. (1901), 49 C. C. A. 31. Question how far the statute of Pennsylvania providing that the untruth of statements made in application for life insurance should not be a valid defense to an action on the policy unless material to the risk affected the setting up of this defense in a federal court.

Held: "In extending the judicial power of the United States to controversies between citizens of different states, the only purpose indicated by the constitution was to provide another forum than that of the state, not another law than that of the state. In this case the court below was exercising a jurisdiction concurrent with that of the courts of the State of Pennsylvania. It was administering the law of that state, and was as much bound by its statute and common law, and its declared public policies, as would be the state courts in a like case. The cases,

therefore, of *Herrnany v. Association*, 151 Pa. 17, 24 Atl. 1064, and *Keatley v. Insurance Co.*, 187 Pa. 197, 40 Atl. 808, appeal to us strongly, both in reason and authority."

In *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 365, the court holding that the Federal Courts exercised their own judgment in reference to the doctrines of commercial law and general jurisprudence, yet clearly shows that in so doing they are applying the laws of the state.

"The Federal Courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

These cases show that there is no general commercial law, separate and distinct from the law of the several states; and that this contract is governed by the law of some particular state. That state is Wisconsin, for there is the place of this contract and of the performance of this obligation.

B. 2. The determination of the law of a state in the federal courts.

If it be assumed that the question of the validity of a contract of insurance as affected by public policy be one of general commercial law—an assumption which we shall find is not justified by authority or reason—still the federal courts, in the exercise of an independent judgment, are not wholly oblivious of state decisions. On the contrary, the federal courts have always looked to the decisions of the state of the obligation as of great weight and great respect.

(a) In matters of general commercial law or general jurisprudence, the decisions of the state tribunals are of great authority.

In *Carpenter v. Providence Ins. Co.*, 16 Pet. 495, Mr. Justice Story says (p. 511):

"Whatever respect, therefore, the decisions of the state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court."

And in *Swift v. Tyson*, 16 Pet. 18, he says:

"Undoubtedly the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed."

(b) In the enforcement of statutes or the construction of statutes, the federal courts make no extrinsic inquiry.

But more than this, when the case involves a statute, its construction, operation or effect, the federal courts refuse to make any independent inquiry, but enforce the statute, and in matters of construction, operation or effect, adopt the rulings of the courts of the state.

William v. Gaylord, 186 U. S. 157, 46 L. Ed. 1102. Question as to the weight to be given to a decision of a state tribunal as to the scope of a statute relating to the power of a corporation. It was insisted "that the circuit court had failed to distinguish between a decision of a state court construing the terms outlining the effect of the statute as enacted and a decision that certain persons, not mentioned or referred to in the statute, may, by reason of relations existing between them and the stockholders under general principles of corporation law, become beneficiaries of the statute under consideration."

Held, Mr. Justice Shiras, speaking for the court:

"We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The supreme court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute be-

yond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence; and if whenever such application occurs the authority of the state courts to interpret the statute ceases, the Federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the states."

In *Flash v. Conn.*, 109 U. S. 37, 27 L. Ed. 966, the court, enforcing a New York statute in a case arising in Florida, said:

"If this were a case arising in the state of New York, we should, therefore, follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to a different construction."

So in *Whitfield v. Ætna Life Ins. Co.*, 205 U. S. 489, the court considering a statute of Missouri providing that no insurance company should be permitted to raise the defense of suicide to any action of life insurance policy, held that where the legislature of the state had spoken it had no further duty than to enforce it, saying:

"Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reason alone be disregarded—for it is the province of the state by its legislature to adopt such a policy as it deems best, provided it does not in so doing come into conflict with the constitution of the state or constitution of the United States."

(c) In questions of policy, the statutes and decisions of the state courts are controlling.

These cases show that the assumption that in matters of public policy the federal courts will exercise an independent judgment, irrespective of rulings by the tribunals, is unwarranted; for the public policy of the state is chiefly evidenced by the trend of legislation, and its effect. If the federal courts adopt the rulings of the state court as to the construc-

tion and operation of a statute, they must necessarily adopt the rulings, that phase of statutory construction, its policy. In question of public policy the federal courts adopt and enforce the statutes of a state and the decisions of the state tribunals.

Story, J., in *Vidal v. Girard*, 2 How. 127, says:

"Nor are we at liberty to look at general considerations of the supposed public interest and policy of Pennsylvania upon the subject beyond what its Constitution and laws and judicial decisions made known to us. The question of what is the public policy of a State and what is contrary to it if inquired into beyond these limits will be found to be one of great vagueness and uncertainty and to involve discussions which scarcely come within the range of judicial duty and function and upon which men may and will complexionally differ."

Chief Justice Chase, in *License Tax* case, 5 Wall, 462, says:

"This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort, must, in general, be addressed to the Legislature. Questions of policy determined there are concluded here. There are cases, it is true, in which arguments drawn from public policy have large influence, but these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is, and in which what would otherwise be of obscure or doubtful interpretation may be cleared and resolved by reference to what is already received and established."

Any other rule would lead to the unreasonable result that a contract controlled by the laws of a State might be annulled by the United States Courts on some supposed ground of public policy which the courts of the State, or even the State Legislature itself, had declared was not to affect it. It is claimed here that such a result is to be accomplished—the Wisconsin laws are to be ignored and this contract annulled

by the application of some principle of commercial law. Such a contention was most strongly pressed upon the court in a case construing a life insurance policy, *New York L. Ins. Co. v. Craven*, 178 U. S. 389, 44 L. Ed. 1116. (See brief of counsel, 44 L. Ed., *supra*.) But the court said, p. 1123:

"But the interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculation or views of our own. Nor can such interests or policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced."

The opinion of the Circuit Court of Appeals in its opinion in this case well illustrates how that the public policy of a state, evidenced by its statutes and decisions, is enforced in the federal courts irrespective of the views of that court on these questions. The court said (Record, p. 116):

"The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the constitution or laws of that state; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character, when established by repeated decisions.' *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555.

"That this position has from the beginning and uniformly since been held by the Supreme Court, cannot be more strikingly illustrated than by its decisions touching indefinite charitable bequests and devises. In 1819, Chief Justice Marshall rendered his opinion in *Baptist Association v. Hart*, 4 Wheat. 1, in which he held such could not be established by a court of equity, independent of the statute, 43 Eliz. The case came from Virginia where the public sentiment was distinct and very bitter against these indefinite charities, especially to church' organizations. Judge Story subsequently published a concurring opinion in this case, 3 Pet. (App.) 481 (497?). Subse-

quently he changed his mind and wrote the opinion in *Vidal v. Girard's Ex'r.*, 3 How. 127, upholding such a bequest. (See also *Fontain v. Ravennel*, 17 How. 369.) The Virginia public policy, however, became firmly established in accord with the ruling in *Association v. Hart*, against the validity of such indefinite charities. See *Gallego's Ex'rs v. Attorney General*, 3 Leigh 450. In consequence, in *Wheeler v. Smith*, 9 How. 55, and again in *Kain v. Giboney*, 101 U. S. 362, both Virginia cases, the case of *Association v. Hart* was followed and such indefinite charitable bequests were held void, solely because the rule of public policy in Virginia, as determined by the decisions of its courts, demanded it and this too notwithstanding the fact that it was clear that Chief Justice Marshall had been mistaken in saying that such charities in England could not be established by a court of equity independent of the statute of 43 Eliz., and the further fact that the Supreme Court in the *Girard* case and in other cases arising from other states where no such rule of public policy prevailed, had upheld such charities. In fact in *Russell v. Allen*, 107 U. S. 167, Mr. Justice Gray says:

"And the only cases in which this court has followed the decision in *Baptist Association v. Hart* have, like it, arisen in the state of Virginia, by the decisions of whose higher court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts."

"It would seem clear, therefore, that the Supreme Court by this line of decisions, so uniformly upheld for so many years, notwithstanding we be in entire accord with it as to what constitutes the true principle of public policy based upon sound morals in the premises, has directed us if the state has, by its statutes or the decisions of its highest court, established as contrary rule not contrary to constitutional inhibition, to follow such rule in the enforcement of contracts arising under the laws of that state and not otherwise."

From this discussion it will be seen that in determining the public policy of a state as affecting an obligation arising in that state, the federal courts not only give great consideration to

the decisions on the question by state tribunals, but they are constrained to adopt those rulings as definitive of the policy of the state.

B. 3. The law of this obligation is the law of Wisconsin.

The Circuit Court of Appeals has held this contract to be governed by the law of Wisconsin. It is insisted, however, that this contract is properly held to be a Virginia contract. The rulings of the court in this particular has been made the chief ground on which the writ of error was allowed. For counsel contend that in this holdings, the Circuit Court of Appeals has departed from the rulings of this court as to the law governing policies of insurance. But an examination of the facts will show that the court has applied that rule accurately and with precision.

- (a) Wisconsin is the place of execution of the contract and there is the place of payment of the first premium and there is the place of performance.**
- (b) The stipulations of fact in the record and the findings of the lower courts.**

It is urged that in finding it was a Wisconsin contract, the Circuit Court of Appeals said nothing as to where the application was made, where the first premium was paid, where the policy was delivered, nor does it make any allusion to the express provision of the policy that it should not become a contract until the first premium was actually paid.

The place where the application is made is immaterial unless that is the place where the final contract was closed.

We might say, by way of parenthesis, that what the court said on the subject of the place of the contract was merely incidental and by way of addition to what had been previously said, showing that the Wisconsin law controlled in this case, on the ground that McCue had a property interest as stockholder in the defendant corporation, which interest was vested by the statutes of Wisconsin, by which it was created.

We will have to dispute the statement that the Circuit Court of Appeals failed to advert to any material fact which was then open for decision, which would be relevant to show in what state was the place of the contract. The language of the court was:

"In addition to this, the policy on its face shows it was *executed* at the office of the Company in Wisconsin and by its express terms was made payable there."

The language of the Policy, referred to by the court, is as follows (Printed Record, p. 22):

"In witness whereof, the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary, signed and delivered this contract, this fifteenth day of March, one thousand nine hundred and four."

The signing and *delivering* the contract is the execution which the court has found took place in Wisconsin.

That the word "executed" includes delivery can not be successfully disputed.

Blacks' Law Dictionary defines "execute" thus, among other definitions: "To make; as to execute a deed which includes signing, sealing and delivery."

In *re Masneger v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 86. The complaint alleged that the defendants did "execute under their hands and seals and deliver" mortgage in question. The answer denied the execution of the mortgage, but did not supplement this with the further denial that it was delivered. It was contended that the failure to use the word "deliver" in the denial was a failure to deny the delivery alleged. Held: The word "execute," when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of such instrument.

Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532. Petition in suit to quiet title to land alleged that plaintiff held under a deed made and executed to her by Brown. It was

contended that the petition was defective in that it contained no specific allegation that the deed was delivered to complainant and therefore stated no cause of action. The court, after giving one of the definitions of Webster of the word "Execution:" "The act of signing, sealing and delivering a legal instrument," Held:

"The averment in the petition that the grantors 'made and executed' the deed, under the definitions already given, includes the delivery of the instrument as a conveyance of the property."

Nicholson 'v. Comos, 90 Ind. 515, 46 Am. Rep. 229:

"In a legal sense the word 'executed' includes delivery and implies a completed contract."

From the foregoing, it is plain that when the court found that the contract was executed in Wisconsin, it found that the policy was delivered there and a contention before this court that it was delivered in Virginia is an effort to have this court review a finding of fact made by the lower court. It is unnecessary to cite any of the numerous cases in which the court has laid it down as an invariable rule that findings of fact by a lower court are not reviewable here.

The policy provided that it should not take effect until the first premium should have been actually paid while the assured was in good health. Upon this question we likewise find that the subject has been settled by the finding of the lower court.

The circumstances attending the payment of this premium have been already detailed. The notes which McCue gave were paid in Virginia, while the payment of the premium by Mr. Cary to the Company was made in Wisconsin. The agreed statement of facts on this subject (Printed Record, p. 78):

"The Company at its home office in Milwaukee, received the whole amount of premium, viz. \$427.50, in cash from Cary May 2, 1904, and had no knowledge of the note arrangement."

Now, we did not know whether Cary was in fact in his private capacity or as general agent of the Company in accepting payment of these notes and it was argued that as the policy provided that it was not to go into effect until the premium was actually paid and since no premium had been actually paid by McCue until after he was arrested and in jeopardy of being hung, the Company by consenting that the premium should be paid and the policy go into effect after knowledge of this jeopardy, were estopped to deny that death by hanging was one of the risks contemplated by the parties when the contract first became binding. The circuit court, however, found the facts upon this point to be different (p. 68):

"The question of estoppel can be very briefly disposed of. The insured at the time the policy was issued gave his note, payable in six months, for \$427.50, the amount of the premium for eighteen months. This note was payable, not to the company, but to the local solicitors personally. They in turn executed their note, for the same amount due at the same time, to the personal order of T. A. Cary, the state agent of the company, to which the note of the insured was attached as collateral, and both notes were sent to Mr. Cary. He thereupon sent the amount of the premium in cash to the company. The company had no knowledge concerning the making of the notes. After the charge of murder had been made against the insured and while he was in jail on the charge, but while still protesting his innocence, he paid the note by checks drawn to the order of 'T. A. Cary, Gen'l Ag't.'

"It seems to me that the payment by Mr. Cary to the company, long before the murder, completed the contract; absolved the insured of any liability to the company for this premium, and left Cary personally, the creditor of the insured. In other words, even if there were otherwise room for a possible application of the doctrine of estoppel, there is here no foundation for such claim. The company in no sense received any premium payment after the charge of murder had been made against the insured."

It will be seen that the Circuit Court of Appeals overlooked neither of the two particulars mentioned by counsel in the Petition for the Writ, as important. The court found that the contract had been executed in Wisconsin and the finding of the lower court that the premium had been paid in Wisconsin required under the authorities cited by our friends, that the contract should be held to be governed by the law of Wisconsin.

The decision of the Circuit Court of Appeals presents none of the requisites which this court has laid down as controlling the propriety of the issue of the Writ of Certiorari. These requisites are stated in *In re John Woods*, 143 U. S. 202, 36 L. Ed. 125, and *Forsythe v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095, 1098. In the latter case Mr. Justice Brewer, speaking of the use of the writ of certiorari said:

“* * * while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts or appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.”

There is here neither a question of international importance, nor of conflicting views between the Circuit Court of Appeals and this court, or the Circuit Court of Appeals of other circuits. The writ of certiorari has been improperly issued and although the court has taken jurisdiction it would seem that the proper procedure would be to dismiss the case. This motion we now make.

B. 4. The law of Wisconsin does not avoid this contract as against public policy.

Statute authorizes the risk here involved.

Turning then to the law of Wisconsin we find that this

contract of insurance by this company has been expressly authorized. This company was incorporated by special act of the Legislature. A corporation exercises its functions only by virtue of legislative grant and accordingly an act granting a charter to a corporation operates not merely to limit and define the powers of a corporation but to grant and authorize the exercise of powers. What powers are not granted a corporation cannot exercise. Moreover, where, as here, a corporation is created by special act, that act is a special grant and no argument can be made that there is any implied exception to powers so expressly granted. The act is an authorization to do all which its terms include.

The terms of this special act specify that the "corporation hereby created shall have power to insure the lives of its respective members and to make all and every assurance appertaining to or connected with life risks." Section 3, (Printed Record, p. 81.) Language could not be broader and more inclusive: "the lives of its respective members" and "to make all assurances appertaining to or connected with life risks." To insure a life means to insure against death—death from any cause—and death by hanging is certainly a cause of death.

And death at the hands of the law is a life risk. Mr. Justice Brewer in the Burt case, *supra*, thus speaks of the question there presented: "In other words do insurance policies insure against crime? Is that a risk *which enters into* and becomes a part of the contract?" That shows plainly that death by hanging is a risk—though he goes on to show that it was not a risk which was in fact included within the terms of that contract.

Bouvier's Law Dict. defines "risk" as follows:

"A danger, a peril to which a thing is exposed." "In insurance on lives, the risks are the death of the party, from whatever cause."

May on Insurance, uses this language (402):

"Unless there be in the policy specific limitation, the risk extends to all losses by fire, death or accident, or whatever cause of loss, or injury be insured against, however they may be occasioned."

An insurance policy is to be construed most strongly against the company, because it was written by the company.

Thus the Legislature of the State of Wisconsin has expressly authorized this company to undertake this risk. And what the Legislature has authorized and directed the courts refuse to narrow and limit. The breadth of this statute cannot be limited by consideration of public policy. A statute is the authoritative and final declaration of public policy.

It has been universally held that the legislative declaration in authorizing or forbidding certain courses of action, is final and conclusive upon the courts and that questions of public policy can in no way effect the construction of a statute.

Carpenter's Estate, 170 Pa. St. 203, 50 Am. St. Rep. 765, considering the general statute of descents, says:

"It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such contention? How can such a proposition be maintained when there is a positive statute which disposed of the whole subject. How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion."

Justice Field, in *Hadden v. Barney*, 5 Wall. 518, laid down this rule:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

See also quotation, *supra*, from *License Tax Cases*, 5 Wall. 462.

The statute here is plain and unambiguous. "All risks" does not mean some risks.

In *U. S. v. Trans-Missouri Asso.*, 166 U. S. 290, holding that the Sherman anti-trust act applied to all combinations among railroads to control freight rates, on p. 327, the court uses the following language:

"What is the meaning of the language used in the statute, that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers—all contracts of that nature?"

It was argued that the meaning of the act was only to declare unlawful such contracts in restraint of trade as were unreasonable, leaving all others unaffected by the provisions of the act, that the common law meaning of the term "contract in restraint of trade" was established and when the term is used in the statute it must be understood with reference to its common law meaning.

On the other hand it was argued at the bar, that Congress had said "every contract in restraint of trade is illegal." When the law says "every" there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If Congress meant to forbid only restraints of trade which were unreasonable, they would have said so; instead of doing this it had said "every," and this word of universality embraces both contracts which are reasonable and unreasonable (p. 345).

We cannot abbreviate the argument better than by quoting Mr. Justice Peckham, speaking for the majority of the court:

"The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwith-

standing the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not clear, nor are the reasons for the exception so potent as to permit us to interpret an exception into the language of the act, and to thus materially alter its meaning and effect. It may be the policy evidenced by the passage of the act itself will if carried out, result in disaster to the roads and in failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are not for us. If the act ought to be read as contended for by the defendants, Congress is the body to amend it and not this court, by a process of judicial legislation, wholly unjustifiable. * * * The public policy of the government is to be found in its statutes, and when they have not directly spoken, then the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks upon the particular subject, over which it has constitutional power to legislate, public policy in such case is what the statute enacts."

So in *Shellinberger v. Ranson* (Neb.), 25 L. R. A. 565, the court, considering how far the provisions of the statute of descents could be varied in aid of public policy because the heir had murdered the ancestor, said:

"The statute of descents neither recognizes a mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. The rule affords no warrant for adding an important exception to a statute which in clear

language defines a rule of public policy. Even in consideration of remedial statutes courts should be guided by the maxim 'index animi sermo,' and the interpretation should be consistent with the language employed. Knowledge of the settled maxims and principles of statutory interpretation is imputed to the Legislature. To the end that there may be certainty and uniformity in legal administrations, it must be assumed that statutes are enacted with a view of their interpretation according to such maxims and principles. When they are regarded the legislative intent is ascertained. When ignored, the interpretation becomes legislation in disguise. When the Legislature, not transcending the limits of its powers, speaks in clear language upon the question of public policy, it becomes the judicial tribunals to remain silent." Citing *Hadden v. Barney*, 72 U. S. 5 Wall. 107; *Hyatt v. Taylor*, 42 N. Y. 258; *Re Powers*, 25th Vt. 261; *Flint, etc., Road Co. v. Woodhul*, 25 Mich. 99; *Kent v. Mahoffy*, 10 Ohio St. Rep. 304.

So in *Owens v. Owens*, 100 N. C. 242, where a widow who had murdered her husband sought her dower, the court said:

"We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands, and it belongs to the law-making power alone to prescribe additional grounds for forfeiture of the right which the law gives to the surviving wife. Forfeitures of property for crime are unknown to our law."

And in *In re Runk (Ia.)*, 101 N. W. 151, the court refused to extend to a widow the provisions of a statute to the effect that devisee or legatees guilty of murder of the ancestor should not inherit, saying:

"But it is contended also that it would be against public policy to permit the defendant to derive advantage from her criminal act. The public policy of a State is to be found by its courts in its statutory enactments and its judicial records, and when such policy touching a particular subject has been declared by statute as in this case, it is controlled by such statute, and the courts have no authority to say that the Legislature should have made it of wider application."

See also *McKinnon v. Luncy*, 24 Ont.
In re Gollniks' Estate (Nov. 1910), 128 N. W. 292,
 (Minn.).

Question whether a wife who had been convicted of murder in the second degree, in killing her husband, was entitled to homestead and certain personal property.

Held, she was entitled, irrespective of her crime, under the plain terms of the statute.

O'Brien, J., thus states his views:

"I realize the full force of the view of Mr. Justice Elliott, so ably expressed by him in *Wellner v. Eckstein*, but am convinced that one of the highest duties resting upon the judicial department of the state is to refrain from trespassing upon the domain assigned to either of the other departments. The fact that under the constitution the responsibility of maintaining the separation in the powers of the government rests ultimately with the judiciary, should make a court from whose decision there is no appeal, hesitate before assuming a power as to which there is doubt, and resolve all reasonable doubts in favor of a co-ordinate branch of the government unless such conclusion leads to a palpable wrong or absurdity. We are now asked to add to a clear and unambiguous statute an exception and while the demand in this instance appeals to every normal person's sense of justice, it would establish a rule of construction, the limitation of which no one could foresee. This is well illustrated in the present case. The respondent was convicted of murder in the second degree, which excludes the idea of premeditation, so that the motive for the crime could not have been the acquisition of her husband's property. If her right to inherit in this case is denied, the same reasoning would justify a similar denial where the claimant was convicted of homicide in a still lower degree and the judgment of judicial officers as to when and in which cases the statute-heir is entitled to inherit, would be substituted for a legislative determination of that question."

Lewis, J., thus states his views:

"I am of opinion that the statute of descent was never in-

tended to apply to a case such as *Wellner v. Eckstein*. When a statute may be construed in accordance with reason and a strict reading of the language leads to a result abhorrent to reason, the rule of implied exception should apply. * * * But I admit that the rule of implied exception cannot apply when it does not conclusively appear that the murder was committed for the purpose of acquiring the property of the party murdered. In the present case, Mrs. Gollnick was indicted and convicted of murder in the second degree and there was an absence of premeditation or plan and although she killed her husband intentionally, it does not follow that the motive was the acquisition of his property."

The distinction drawn by Lewis, J., in the case last cited, throws the case at bar into the class where no exception can be implied to an express statute. If only such cases as disclose that the crime was committed for the purpose of acquiring property by virtue of a statute are to be excepted, plainly this case is not within the exception. No court can suppose that an insured would murder his wife for the purpose of benefiting his estate or the beneficiaries of an insurance policy. And it must be equally plain that the broad words of the statute, that this company shall insure all life risks, is not susceptible of an exception as to the risk here involved.

The decisions of Wisconsin support this recovery.

The law of Wisconsin on the validity of this clause is not uncertain of determination. In *Patterson v. Natural Premium Ins. Co.*, 100 Wis. 118, 69 A. S. R. 899, the insured had committed suicide while sane. The policy contained no exception as to suicide. The beneficiaries of the policy were the children of the deceased. Question whether the company was liable.

Held: "In determining what rule should be adopted by this court in the present case, there are numerous considerations which deserve attention. It must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention. It can hardly

be otherwise than that the agent soliciting insurance under such a policy as this would at once call attention to its apparent liberality, in that there was no suicide clause, and, further, that there was in addition an 'absolutely incontestable' clause, and the average layman (not to say lawyer), in looking it over, would conclude that it was in fact a very favorable policy to the insured. These provisions are all carefully framed by the insurance company, and expressly framed to induce people to insure; and the principle is familiar and just that, when the policy is capable to two meanings, that which is most favorable to the insured is always to be adopted; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913. In at least one state—Missouri—there exists a statute which prohibits the defense of suicide, except when it was contemplated at the time of effecting the insurance, and makes void any contrary stipulation in the policy: *Mo. Rev. Stats. 1889, sec. 5855*. This statute has been enforced by the courts of Missouri, and by the circuit court of appeals of the United States, without apparent question as to its validity on the ground of public policy: *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Knights' Templar, etc., Co. v. Berry*, 4 U. S. App. 353; 50 Fed. Rep. 511. Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the Ritter case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in a case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply in a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us."

This decision holds, then, that the law of Wisconsin does not inhibit the acceptance of the risk by suicide. No policy of the law is subverted by the acceptance of this risk. As to whether the estate of the beneficiaries should recover is not

involved in the discussion at this point, for our inquiry at this time is confined to the effect of public policy on the risk.

If recovery can be had although the insured committed suicide, it certainly follows that recovery can be had where the insured is executed for crime. The Circuit Court of Appeals, in its decision, tersely puts the conclusion (Printed Record, p. 113):

"If this be true then it necessarily follows that, if McCue in this case, after killing his wife, actuated by the remorse and terror that follows such a deed, had taken his own life, then there could be no question but what, under these decisions, his infant children could derive the benefit of this insurance; and the application of the doctrine of public policy in this case must be enforceable only because he did not go a step farther and commit the two crimes of murder and self-destruction instead of the one alone."

Concluding this first main division of our argument, we quote from the Circuit Court of Appeals (Printed Record, p. 118):

"We are driven to the conclusion that the rule of public policy in Wisconsin, as established by the Legislative act creating the defendant company and defining its rights and powers and by the decisions of its highest court is directly opposite to that established by the Supreme Court in the Ritter and Burt cases, and that in compliance with the direction of the Supreme Court as herein set forth in such case involving public policy, we must construe this Wisconsin contract in accord with its law and its supreme court's ruling."

II. The right asserted is a property right vested by the special statute of incorporation which is not divested by crime.

The next proposition, which we claim controls this case, may be stated as follows:

The rights here involved include more than a simple contract of life insurance; they involve in fact a membership by McCue

in the Company. This membership was a valuable vested property right, which is regulated by the statute of Wisconsin incorporating the Company and which, by the terms of this statute, devolved upon McCue's executors.

The statement of the Circuit Court of Appeals on this point is as follows (Printed Record, p. 117):

"The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that state, which distinctly defines its power and obligations. This Act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides that those 'who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns * * * shall thereby become members thereof during the period they shall remain insured.' It gives them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and officers; to sue said corporation and to be sued by it touching their rights and obligations as such members, and it goes to the extent of expressly defining the rule of evidence as to disqualification of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies."

The importance of this view of the case is at once manifest. It distinguishes this case from all the cases cited by adversary counsel, for in none of them was recovery claimed on this ground.

The charter controls the rights of members irrespective of the place where such rights may have been acquired.

In considering this view of the case, it is immaterial where the contract is made, for the principle is that the rights

and liabilities of a stockholder of a corporation are to be determined by the statutes and jurisprudence of the state which created it. *Glenn v. Liggett*, 135 U. S. 533 (34 L. Ed. 262); *Smith v. Kernochen*, 7 How. 198 (12 L. Ed. 667).

In *Jellenak v. Huron Copper Co.*, 177 U. S. 1 (44 L. Ed. 647), the state statute made stock in corporations personal property. The court said (p. 13):

"That is the rule which the circuit court of the United States sitting in Michigan should enforce as part of the law of the state in respect to corporations created by it."

In *Flash v. Conn.*, 109 U. S. 371 (27 L. Ed. 966), the court holding that it should follow the New York statute providing for the individual liability of a stockholder in a New York Corporation and this whether the suit were instituted in New York or elsewhere, said:

"If this were a case arising in the State of New York we should therefore follow the construction put upon the statute by the courts of that State. The circumstance that the case comes here from the State of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York and a different interpretation in a case arising in Florida."

We do not find that opposing counsel have made any serious effort to controvert our views upon this branch of the case. They rest their contention upon the claim that the contract here was not made in Virginia, which is entirely immaterial, and upon the further contention that some supposed rules of general commercial law can override the state law as to the rights of members of a state corporation, which is a subject entirely local.

Under the charter of the company McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this membership passed to his executors.

The charter of the company, § 1 (Printed Record, p. 81),

provided that certain persons named "and all other persons who may hereafter associate with them in the manner hereinafter prescribed shall be, and are, declared a body politic and corporate."

Section 4 (*id.*, p. 82) prescribes that persons who shall hereafter insure with the company "shall thereby become members thereof." And § 7 (*id.*, p. 82) prescribes the manner in which this membership is to be perfected. "Every person who shall become a member of this association, by effecting insurance therein," shall, the first time he effects insurance, pay the rates fixed by the trustees, etc. There can be no doubt, then, that McCue was a member of this corporation. He insured with the company, and thereby he became a member. His interest in the company was fixed by the amount of his insurance. This membership constituted a vested property right. He was eligible as an officer, and entitled to vote in the management of the company (§ 20, *id.*, p. 90); entitled to dividends on the surplus and profits (§ 2, § 13, *id.*, p. 94); and was a joint owner of the assets of the company.

In 21 Am. & Eng. Encyc. 269, it is said:

"The assets in a mutual insurance company belong to the members, as in the stock companies they belong to the stockholders, the members being interested therein in proportion to their several contributions. In the same proportion are the members entitled to share in the surplus of losses and expenses."

The right of a member to share in the management of a mutual insurance company is stated in the case of *Condon v. Mutual Reserve Association*, 89 Md. 99, 73 Am. St. Rep. 196. The court, by McSherry, C. J., says:

"A policy-holder in a mutual insurance association stands in a twofold relation toward the company. He is a policy-holder and he is a member. Growing out of this, as well as altogether apart from it, there may be a distinct relation of creditor, but with this latter we are not now concerned. He is alike insurer and insured, but in both

capacities he is a member; and it is solely because he is a member that he occupies either of these positions. His liabilities as insurer and his rights as insured depend wholly upon the obligations and the conditions of his membership. Those obligations and conditions are evidenced by the constitution and the by-laws of the association and by his application for, and his certificate of membership, and by the law of the place of the contract. Apart from these there is nothing by which his duties and his rights as a member are to be determined.

In the case of *Huber v. Martin*, decided in January, 1906, by the Wisconsin Supreme Court, reported in L. R. A. (New Series), vol. 3, p. 653, the question was whether a person insured in a mutual insurance company had the same interest in its assets as the stockholder in an ordinary corporation. The provision of the charter was practically identical with the one in this case:

"Every person who shall at any time become interested in said company by insuring therein, and also his heirs, executors, administrators and assigns, continuing to be insured therein * * * shall be deemed and taken to be members thereof for and during the term specified in their respective policies, and no longer."

The question was as to the right of such member to participate in the surplus assets of the company upon a reorganization. The court said:

"With language so plain it seems useless to spend time in endeavoring by construction to read some idea out of it not found in its letter."

After carefully considering numerous authorities, the conclusion of the court was expressed as follows:

"We hold that there is no difference between business corporations as regards ownership of property. In the general sense, every member of a mutual corporation is a stockholder, and is the equal of every other member similarly situated, or any member of any corporation having equal interest, proportionally, as to holding the beneficiary

title to the corporate assets. For corporate purposes only the corporate entity owns the property; otherwise, it belongs to the members. No principle of law is more firmly founded in reason, and none more important to be kept in bold relief by the courts, so as to challenge the attention of those who have to do with corporate affairs, especially corporations dealing with the subject of insurance."

As we have seen, these rights of membership are fixed and determined by the law of Wisconsin—the charter having been granted by the Legislature of that State. The rights and liabilities of a stockholder of a corporation are to be determined by the statutes and jurisprudence of the State which created the corporation. The decision of the Wisconsin court in construing a charter such as this is therefore conclusive.

The charter provides for devolution of the right on death.

The question which next arises is, What becomes of this membership interest upon the death of the original member? This question is answered by the charter, § 4 id., p. 82, as follows:

"Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporations, and no longer."

This statute seems too plain, as was said in *Huber v. Martin*, *supra*, to admit of any "construction."

Where the personal representatives are to be the recipients of the insurance, they succeeded to the membership until the loss is paid.

By § 12, id., p. 83:

"Suits at law may be prosecuted and maintained by any member against said corporation, for loss by death, if payment is withheld more than three months."

Suits for loss by death, that is, by the death of a member,

shall be brought by any member, that is, by the surviving beneficiary, who has become a member by reason of the death of the original member, that is, by the executors of the original member where the insurance is payable to them.

Having shown a property right surviving to the executors, the question is, How is this property right to be forfeited?

The expression is, "continuing to be insured as hereinafter provided." We find nothing in the charter providing for its destruction by expulsion of the member, the only mode "hereinafter provided" for termination of the membership is payment for "loss by death."

The Legislature of Wisconsin gave to this company the unlimited power to "insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks."

This statute is unrestricted; it did not limit the power to assume life risks, it would be nothing less than judicial legislation to add to the act the words "except those arising from suicide or hanging."

A restriction of the time that a person should continue to be insured and thus continue to be a member could, of course, be regulated by express stipulation. Here the only restriction is found in the application, *id.*, p. 26. One of these restrictions is death by suicide within one year from the date of the policy. Yet the argument of petitioner's counsel would lead to the result that suicide even after a year would be excluded, notwithstanding the plain provisions of the statute and the stipulation of the parties.

In *McCoy v. Northwestern Relief Association*, 92 Wis. 577, the question was whether death by suicide was excluded from the risk. The Supreme Court of Wisconsin, Martin J., said:

"It is well settled that if a contract of life insurance does not provide against liability in case of death by suicide, or self-destruction, then such cause of death does not constitute a defense."

It is laid down as an elementary rule in Angell and Ames Corp., § 410, that no company having a large stock, in which the members are interested as proprietors, can drive them from the society, unless such power has been expressly conferred by charter.

The charter here contains no such provision. We have, then, a valuable property right, with a statute prescribing how it shall pass at McCue's death. No rule of public policy can supersede the plain provisions of this statute. This principle is firmly established.

Where the law provides a method of devolution, that method controls and the courts do not inquire further.

We might well at this point content ourselves with referring the court to the authorities cited above, which establish that it is not for the courts to enter into the question of public policy when the Legislature has spoken on the subject, and in construing transactions such as this the United States courts are governed by the State statute, without regard to what their opinion may be in regard to the policy involved. These authorities would seem conclusive of the question, for, as we have seen, the Supreme Court has decided (*Glenn v. Ligget*, *supra*) that the rights of a stockholder of a corporation are determined by the statutes and jurisprudence of the State which created the corporation.

We are fortunate, however, in having a well-considered and conclusive line of authorities, which hold that, where, as in this case, a statute prescribes the manner in which property shall pass upon death of the owner, no consideration of public policy can change the course of descent prescribed by the statute, even in the case, the most extreme that can arise, where the person designated to receive the property upon the death of the owner murders such owner for the purpose of coming into possession of the property.

This is merely an application of the elementary principle stated in *Broom Leg. Max.* 289:

"The maxim that no man can take advantage of his own wrong only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed."

This line of authority has been referred to above but it is convenient to consider them at this point.

In the well-considered case of *Schellenberger v. Ransom* (Neb.), 25 L. R. A. 565, quoted with approval in a number of subsequent cases, the facts were these: Leander Schellenberger feloniously and of his premeditated malice killed his daughter, Maggie, for the purpose of possessing himself of her estate, he being her heir-at-law. The court said:

"The statute of descents neither recognizes a mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. The rule affords no warrant for adding an important exception to a statute which in clear language defines a rule of public policy. * * * When the Legislature, not transcending the limits of its powers, speaks in clear language upon the question of public policy, it becomes the judicial tribunals to remain silent." Citing *Hadden v. Barney*, 72 U. S. 5 Wall. 107; *Hyatt v. Taylor*, 42 N. Y. 258; *Re Powers*, 25 Vt. 261; *Flint, etc., Road Co. v. Woodhul*, 25 Mich. 99; *Kent v. Mahoffy*, 10 Ohio St. Rep. 304.

The court refused to interfere with the plain terms of the statute by reading into it an exception on the alleged ground of public policy. The heir was permitted to take the property, although he had killed its owner for the purpose of acquiring it.

In the case of *Owens v. Owens*, 100 N. C. 242, cited with approval in the above cases, and, among others in the case of *Holden v. Ancient Order, etc.* (Ill.), 31 L. R. A. 70, decided in 1883, it appeared that the complainant instituted proceedings for the assignment of dower in the estate of her husband, for whose death she had been convicted. The trial court ruled against the allowance of dower, but on appeal it was held:

"We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands, and it belongs to the law-making power alone to prescribe additional grounds for forfeiture of the right which the law gives to the surviving wife. Forfeitures of property for crime are unknown to our law."

In *Deem v. Milliken*, 6 Ohio C. Ct. Rep. 357, the facts were these: E. L. Sharkey murdered his mother for the purpose of succeeding to the title of her real estate. He was convicted and hanged, after having mortgaged this real estate. The collateral heirs contended that, by reason of his crime, no interest had passed to the son, and, therefore, the mortgages were void. In the opinion, the court said:

"The natural inference is that, when the Legislature incorporated the general rule into the statute and omitted the exception, they intended there should be no exception to the rule prescribed."

In *Carpenter's Estate*, 170 Pa. St. 203, 50 Am. St. Rep. 765, 29 L. R. A. 147, it was decided that one killing his ancestor for an estate which would naturally come to him under the statute of descent and distribution may take it under a constitution prohibiting attainders and forfeitures of estate and statutes providing no penalty for murder except hanging. The Court said on p. 148:

"Is it possible for courts to designate any different persons to take such estate without violating the law? We have no possible warrant for doing so. The law says, if there is a son, he shall take the estate. How can we think that, although there is a son, he shall not take, but remote relatives shall take, who have no right to take it if there is a son? From what source is it possible to derive such power in the courts? It is argued that a son who has murdered his father has forfeited all right to his father's estate, because it is his own wrongful act which has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments: the courts can only enforce them. In this State no such

punishment as this is fixed by any law, and therefore the court cannot impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? When the imperative language of the statute provides that, upon the death of a person, his estate shall vest in his children, in the absence of a will how can any doctrine or principle or other thing called 'public policy' take away the estate of a child and give it to another person?"

In *McKinnon v. Luncy*, 24 Ont. Rep., reversing 21 Ont. App. Rep., a husband and his grantee, a brother, although the husband killed his wife, were not precluded or debarred from any benefit under will or out of her estate, by reason of having killed her.

In *In re Runk* (Iowa), *supra*, a statute which provided that no person who feloniously takes, or causes to be taken, the life of another shall inherit from such person or take by devise or legacy from him any portion of his estate, was held not to deprive a widow, who had murdered her husband, of her distributive share of the estate. The statute also used this language: "But in every instance mentioned in this section, all benefits that would accrue to such person upon the death of the person whose life is thus taken shall become subject to distribution among his other heirs."

The court held:

"The law is well settled that the distributive share which the widow takes under § 3366 of the Code goes to her as a matter of contract and of right. * * * It is apparent, therefore, that § 3386 does not in express terms prohibit the guilty spouse from taking her distributive share. It is insisted, however, that it was the intention of the statute to prohibit any person from taking or recovering any benefit which might come to him as a result of his criminal act, and that it should be construed in the interest of public justice and public policy."

Quoting from Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, the court continues:

"The power of punishment is vested in the legislature, and not in the judicial department." "It is the Legislature, and not the court, that is to define crime and ordain its punishment."

The court continues :

"But it is contended also that it would be against public policy to permit the defendant to derive advantage from her criminal act. The public policy of a State is to be found by its courts in its statutory enactments and its judicial records, and when such policy touching a particular subject has been declared by statute as in this case, it is controlled by such statute, and the courts have no authority to say that the Legislature should have made it of wider application."

In the case of *Riggs v. Palmer*, 115 N. Y. 506, by a divided court, it was held that a murderer could not take, either as heir or as legatee, the estate of one he had murdered for the purpose of obtaining such estate.

This case, however, has been expressly disapproved by *Schellenberger v. Ransom*, supra, by *Carpenter's Estate*, supra, and the New York court refused to follow it in *Ellerson v. Wescott*, 148 N. Y. 149.

The rule contended for in the majority opinion in *Riggs v. Palmer* is that all laws, as well as contracts, may be controlled in their operation and effect by general fundamental maxims of the common law, viz., no one shall be permitted to profit by his own fraud or to acquire property by his own crime. But the court cited no authority for such doctrine. The decision is thus criticized in *Deem v. Millikin*, supra :

"It must be admitted that the most careful examination of *Riggs v. Palmer* fails to discover any clearly stated and clearly cited principles justifying the decision."

And to this effect in *Schellenberger v. Ransom*, supra :

"Illustrations and applications of the principle of rational interpretation to those made use of by the writer of the majority opinion in *Riggs v. Palmer* will be found referred to in *Sedgwick on Const. and Stat. Law*. They

are commented on in this manner: "These and similar discussions have amused the fancy and exhausted the arguments of text writers. I cannot, however, consider them of much value. Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the practical affairs of life, as they actually occur, that we can acquire that sagacity to decide new and doubtful cases. Arbitrary formulæ, metaphysical subtleties, fanciful hypotheses, aid us but little in our work.' The majority opinion in *Riggs v. Palmer*, as well as the opinion already filed in this case, seems to have been prompted largely by the horror and repulsion with which it may be justly supposed the framers of our statute would have viewed the crime and the consequences. This is no justification to this court for assuming to supply legislation. Neither the limitations of the civil law (Code Napoleon) nor the promptings of humanity can be read into a statute from which they are absent."

It is therefore settled law that, although the heir may kill the ancestor, the wife may kill the husband of the legatee may murder the testator for the purpose of hastening the day of acquiring their property, if the statute of descents, in one case, or the statute of wills, in the other, make no exception, the court has no authority to do so, and there is no principle of public policy which can be invoked to forfeit the rights to property, even though acquired as the direct results of crime. And so here, when the statute designates the beneficiary of the property involved, no court can change it. There was a right here which became vested as soon as the policy was effected, and the statute directed how this right was to pass upon McCue's death. No such conditions were considered in any of the cases cited by petitioner.

Whether the disposition which has been sometimes shown to refuse recovery in a case like this springs from the horror and repulsion which it may be justly supposed exists against a murderer, or whether it is an echo of the old law of attainder, there is no just ground on which it should be allowed to in-

fluence the courts in depriving persons of property rights which the law has given them.

The Circuit Court of Appeals in its decision applies the doctrine of these cases to the case at bar thus (Printed-Record, p. 114):

"From this principle it is clear that if these infant children of McCue had killed their father instead of his killing their mother and getting hanged for it, thereby leaving them innocently without the support of either, then this policy made payable to his personal representatives could have been collected and made to inure to their benefit."

The case of *Collins v. Metropolitan Life Ins. Co. (Ill.)*, 83 N. W. 542, was decided by the Supreme Court of Illinois a few days after this case was submitted in the Circuit Court of Appeals. In the *Collins* case the assured had been executed, but a recovery was allowed. It is interesting to note that while there was no communication between counsel in the two cases, the arguments presented and which prevailed in each case were apparently identical.

Upon the present point, although the *Collins'* case was less strong than ours because it lacked the element of membership in the company fixed by statute, yet the court held upon the principles and authorities cited above that life insurance was itself a valuable property right which was not forfeited to the Insurance Company in case of the execution of the assured. *Vickers, J.*, said:

"An insurance policy payable to the estate or personal representatives of the assured is a species of property. It is in the nature of a chose in action, which, subject to certain conditions, varying according to the terms of the contract, is payable upon the contingency of death or at a stated time. Life insurance has become an important factor in the commercial and social life of our people. To protect their credit, save their estates from embarrassment, and provide for dependent ones, the people of this state pay annually over \$30,000,000 in premiums for life insurance. See Official Report of Commissioner

of Insurance, part 2, p. 6. The amount of insurance carried is approximately \$1,000,000,000. Why should this enormous property interest be subject to any different conditions than those applying to any other property owned by the people? If a man who is executed for crime has at his death \$1,000 in real estate, \$1,000 in chattels, and \$1,000 life insurance payable to his estate, his real estate descends to his heir, and his personal chattels to his administrator, but the \$1,000 life insurance must be left in the hands of the company who has received the premiums because it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policy holders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error's position. This contention seems to border closely on the absurd. We know of no rule of public policy in this state that will enforce this species of forfeiture but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except the performance by the other, which will compel performance or award damages for the default against the delinquent party."

Counsel for petitioner quote numerous charters of mutual insurance companies, yet they fail to show that the provisions of any of these charters have been under consideration by the courts. It can make no possible difference that litigants may have had rights under these charters different from the rights they submitted to the courts for decision. Courts decide cases presented to them by the pleadings and could not, if they desired, go outside of the record presented to learn if there may be some other ground on which a remedy could be granted.

III. Death on the gallows is not impliedly excepted from the risks undertaken.

Public Policy does not except.

In a former portion of this brief, we have discussed the relation of this risk to public policy. That a court should hold

a contract void, the case must show clearly that corrupt action is contemplated. But there is no contract to commit any corrupt act nor was a corrupt act contemplated in the making of this contract. The evil effect of such a contract on public morals or public welfare does not appear. If the contract affords no incentive to murder, the public interest cannot be said to be injured. The benefit in surviving relatives is not subversive of the public interest.

Further, we have seen that the law of Wisconsin controls this contract and that under that law there can be no question but what the obligation is valid. It is a risk authorized by statute and the courts have held it valid.

So, then, there cannot be said to be an enforced exception of this risk. If it is to be presumed that the contract covered only such risks as are valid, this risk is not to be excepted.

The terms of the Policy cover the risk.

We have seen that this company could insure against the contingency which has occurred. Our next inquiry is, has the company insured against this risk? The face of the policy sets out a promise to pay "upon receipt and approval of proofs, of the fact and cause of the death of the said insured," etc. This clause broadly covers all risks, all causes of death. And that covers the whole question. Moreover, § 12 of the charter (p. 98) authorizes action at law to be brought against the company "for loss by death, if payment is withheld for more than three months." In such an action the plaintiff need only allege and prove that the person insured was dead, not the manner of his death.

The canon of construction *expresio unius, etc.*, forbids a construction excepting this risk.

The policy expressly excepts certain causes of death and death under certain conditions. For that reason it must be said to include those causes which are not excepted.

Hawkins v. U. S., 96 U. S. 689:

"Implied promise or promises in law exist only where there is no express promise between the parties. *Expressum facit cessare tacitum*. 'Since,' says Chitty, 'party cannot be bound by an implied promise when he has made an express contract as to the same subject matter,' which is certainly sound law unless the contract has been rescinded or abandoned."

The application which is made part of the policy contains the following (Printed Record, p. 26):

"And I do further agree that if within two years from the date of said policy I shall pass south of the tropic of Cancer, or be personally engaged in blasting, mining or sub-marine operations, or in the production of highly inflammable or explosive substances, or in electrical employment where the voltage used is over 600, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping car conductor, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace), without the written consent of said company, or shall within one year from the date of said policy, whether sane or insane, die by my own hand, then and in every such case any policy issued on this application shall be null and void."

It is generally held that a policy covers all risks not expressly excluded. The insured contracts according to the face of the policy and the courts so construe the contract.

In *Schmidt v. No. Life Asso. (Ia.)*, 51 L. R. A. 141, where the beneficiary of a policy had murdered the insured, suit being brought by the estate, the court said:

"There is no provision in the certificate that it should be forfeited in the event the assured was murdered and no condition of any kind against murder."

The principle is carefully considered in a strong opinion in *McDonald v. The Order of Triple Alliance*, 57 Mo. Ap. 87. The court in its opinion said:

"It will be thus seen that the only question presented for our consideration is whether in a case where the policy

contains no clause of defeasance depending on the cause or manner of the death of the assured, the courts are bound to imply such a clause in the interest of good government."

After considering various cases, and criticising the Amicable case, the court quotes from Harper's *Admr. v. Ins. Co.*, 19 Me. 506:

"In life policies the insurer has a guaranty against increasing the risk insured by that love of life which nature has implanted in every creature. In such policies unless otherwise stipulated, the insurer takes the subject insured with his flesh and blood and passions. Had the case before us disclosed the fact that McDonald insured his life in contemplation of exposing it to danger in the commission of a felony, there would be a reason for holding that the contract was void for fraud, and was against public policy; but the mere fact that after being thus assured, he accidentally exposed his life in violation of the laws, cannot affect the rights of the beneficiaries of the policy to recover thereon in the absence of a clause to that effect in the policy.' All the judges concurring, the judgment is affirmed."

And in *Supreme Lodge v. Menkhausen*, *supra*:

"The contract between the society and the insured contained no provision absolving the society from liability in the event that she was murdered by the beneficiary, and public policy does not require us to read such a condition into the policy."

The same principle was necessarily decided in the case of *Clever v. Mutual, etc., Co.*, 1 Q. B. D. 147.

In excepting death from these causes, the company has undertaken to pay in case of death from all other causes.

Moreover, it is a well-settled rule of construction that an insurance policy will be construed most strongly against the company, because the words are its words. In *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. Ed. 385, the court had under consideration a clause that the policy should not cover loss by fire during the existence of invasion, riot and like commo-

tions "unless proof be made to the satisfaction of the directors" that the loss was not occasioned by or connected with the disturbance. The court said:

"As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used. *First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673, 678, 679, 24 L. Ed. 563, 565; *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 136, 45 L. Ed. 460, 462, 21 Sup. Ct. Rep. 326; *Texas & P. R. Co. v. Reiss*, 183 U. S. 621, 626, 46 L. Ed. 358, 360, 22 Sup. Ct. Rep. 253. In this view the above words should be held to mean that the policy covered loss by fire occurring during the existence of (if not occasioned by nor connected with) any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, in the general locality where the property insured was situated."

And again it is a matter of common knowledge that a clause excepting similar contingencies to those under which the insured died in this case is very common in life insurance policies. The fact that this policy contains no such exception when such exception is common shows that none was intended. A quotation from the opinion of the Supreme Court of Wisconsin expounding the law which governs the obligation of this contract, establishes beyond refutation that the absence of an exception as to this cause of death conclusively shows that this cause of death was included.

In *Patterson v. Natural, etc., Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 902, the court says of the effect of absence of a clause excepting suicide:

"The fact that insurance companies have almost universally deemed it necessary to insert in their policies exempting them from liability in case of suicide 'sane or insane' may perhaps also be considered as showing the general trend of opinion upon the subject in insurance circles; but whether this deduction is to be properly drawn or not we

think it certain that the fact that life insurance policies universally contain this provision is of weight in determining the construction now to be placed upon a policy which omits all reference to suicide and also ostentatiously contains a clause providing that it shall be absolutely incontestable for any cause save non-payment of premiums or misstatement of age. What would an applicant for insurance be entitled to think was the meaning of such a policy when presented to him garnished with the usual and customary commendations of the usual and average solicitor of insurance? Certainly he would not think that its legal effect was the same as that of a policy containing the usual provision against suicide, sane or insane. * * * In determining what rule should be adopted by this court in the present case, there are numerous considerations which deserve attention. It must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention. * * * These provisions are all carefully framed by the insurance company and expressly framed to induce people to insure; and the principle is familiar and just when the policy is capable of two meanings, that that which is most favorable to the insured is always to be adopted."

And in *Moore v. Woolsey*, 4 E. & B. I. B. 243, Lord Campbell, C. J., says of a condition in a policy that if the insured died by his own hand, the policy should become void as to executors and remain valid only as to assignees:

"No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable."

And another line of argument leads us to the same conclusion, that the broad words on the face of the policy construed by the charter of the company, were intended to cover this risk. In the application which is by the policy incorporated in the contract of the parties, it is provided (Printed Record, p. 26), that if the insured "shall within one year from the date of said policy, whether sane or insane, die by his own hand,

then and in every such case any policy issued on this application shall be null and void." The policy expressly insures against death by suicide occurring after one year from date. But it has been said in the Ritter case, on reasoning not unlike that in the Burt case, the court basing its decision on public policy as evidenced in customs and traditions, that such insurance is void. It might just as reasonably be argued that the policy did not expressly include the risk of death by suicide, as it can be argued that the policy does not include death by hanging for crime. The words of promise on the face of the policy evidence no scruples on the part of the company to undertake those risks only which supposedly in strictest circumspection further the growth and welfare of society and the majesty of the law.

We must also mention here, when showing that this was a risk actually covered by the policy, the fact that the company has been paid to assume this risk. The premium paid was regulated from mortality tables which are made up from statistics of deaths—all deaths in a given length of time, not deaths from certain causes. *Campbell v. Supreme Conclave*, etc. (N. J.), 54 L. R. A. 576-578: "Insurance rates are based upon an average expectancy of life derived from experience tables embracing suicide as well as all other causes of mortality." To same effect, see *Lange v. Royal Highlanders* (Neb.), 110 N. W. 1110. McCue in paying a premium regulated on all deaths, including deaths by hanging, has paid the company for the risk of his death prior to hanging. Furthermore, it is impossible to presume that prior to the decision in the Burt case the insurance company, in fixing its premium rates, excluded death by hanging as one of the risks assumed, because it was by no means certain that the courts would exempt them from liability in such cases. Since the decision in the Burt case, it is improbable that the basis of rates has been changed, for the question cannot now be regarded as finally settled so that all the courts will hold that a policy does not under any circumstances cover death by hanging. As long as

any uncertainty remains on the subject it may be safely assumed that an insurance company will not take chances on being required to pay for a loss without being paid for assuming the risk of such a loss. Having received the consideration for this risk, it lies ill in the mouth of the company to deny that it meant to cover that form of death in the policy.

The risk was actually covered and intended to be covered by the policy, for it is the general custom of insurance companies to consider that this risk was covered. McCue had other insurance on his life. (Record, p. 77.) It appears from the administration proceedings of his estate that nearly (45,000) forty-five thousand dollars has been collected. Now, these companies had no right to pay if the contingency which occurred was not one covered by the policy. The fact that these companies paid shows their view of the contract. And that so many paid shows a general custom in insurance circles that this is a risk actually covered by the policy.

Thus it is clear that risk of death at the hands of the law was a risk actually insured against. Every possible construction of the terms of the policy indicates that it was included.

Moreover, the defendant has admitted for purposes of this action that risk of death at the hand of the law was a risk covered by this policy. It has paid the premium received from McCue into court. This payment must have a meaning. This suit in which this money is paid into court involves the rights of McCue's estate against the insurance company on the contract of insurance. And this payment admits that the company has no right to withhold this premium from McCue's estate.

I Hughes on Procedure, § 93, p. 202.

See Greenleaf Ev., 15th Ed. 282, where the law is thus summed up:

"In other words the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money."

Our inquiry as to the meaning of this payment into court,

then, is narrowed to the question, What state of facts would require the company to return the premiums received? We submit that payment of premium into court is utterly inconsistent with the supposition that this risk of death by hanging was excepted and further that it is only consistent with the supposition that death by hanging was intended to be included.

Payment into court negatives the idea that this risk was excepted. For if it is a risk excepted, why should the company return the premium received? The obligation on the company when it issued a policy is to pay a certain sum on the happening of certain contingencies. Because those contingencies cannot occur owing to change of circumstances in no way affects the obligation on the company. That obligation is determined on the issue of the policy. Suppose either expressly or by implication of law death by tuberculosis was excepted. If the assured died of tuberculosis, could it be said that the company must return the premiums received? Or suppose a policy covering death from railroad travel and that only. When the assured dies of tuberculosis, must the company return the premiums? It is certainly not the custom of accident companies so to view their duties. And we know of no reason in law why because that form of death covered cannot occur, the company should return the consideration which it has received for promising to pay if death otherwise occurred. The fact that there is no risk continuing does not change the obligation of the contract. It is the assumption of the risks which the policy covers at the time of the contract which the insured in these cases pays for; and there is no less assumption at that time because subsequently the risk is extinguished. These illustrations show that payment into court of the premiums received is utterly inconsistent with the view that risk of death by hanging was excepted. There was no duty to pay if such risk was excluded and such payment is meaningless. But we believe that this payment has a meaning and that in so paying the company has acted honestly in its

view of the contract. The construction for the payment by McCue of this premium was the company's promise to pay on his death. But if that promise should be worthless then there has been a failure of consideration on the part of the company and the company recognizes a duty to repay. The premium was consideration for a valid promise. And if that promise was invalid as the company contends, then it has received something and gives nothing and so should in common honesty return what it has received. When viewed thus, this payment into court has a meaning. The company must be taken to have assumed that the consideration given by it, that is, its promise to pay on death at the hands of the law, has failed and so that it is its duty to repay. But that assumption necessarily implies that the company contemplated and intended to give this consideration; that it intended to promise to pay if McCue died at the hands of the law. Thus the payment into court is a judicial admission that this policy covered actually the risk of which the insured died.

From these considerations it is plain that the company in this policy has undertaken to pay in the event which has happened.

IV. If the McCue estate cannot recover, the innocent parties interested will be admitted as claimants.

There is still another principle, which was not involved and not considered in any of the cases cited by adversary counsel on which a recovery should be allowed here in favor of the infant plaintiffs, McCue's children. It is, moreover, a principle of universal application with reference to insurance law.

If, notwithstanding the statutes and rules of law referred to above, it be assumed that McCue, by his criminal act, has deprived his executors of the right to recover on this contract, it does not follow that the insurance company can hold the money.

The principle is thus expressed in the case of *Cleaver v. Mult. Reserve Fund L. Asso.*, I. Q. B. 147, which grew out

of the Maybrick murder, where the beneficiary of the policy murdered the assured:

"The doctrine that it is contrary to public policy to permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act ought not to be stretched beyond what is necessary for the protection of the public; and it does not apply where the matter can be so dealt with that such person shall not be benefited."

It should be stated here, in order to illustrate this ground of distinction from the Burt case, 187 U. S. 372, that, upon the murder of the beneficiary, Anna M. Burt, the policy became the property of her murderer, who assigned it to the plaintiff. The title of Burt's assignee could be no better than Burt's title, and Burt's title could not be recognized without permitting him to receive a direct personal benefit from his own crime. Under these circumstances, if Burt had died from natural causes, there could have been no recovery on a title derived from him, but if the suit had been brought by the administrator of Anna M. Burt, the authorities cited below would have permitted a recovery, and on similar principles the children in this case should be permitted to recover. In the Burt case the only question before the court was the validity of Burt's title, and that was the only question that could have been decided there. The decision can be held as binding authority for nothing else.

The case is distinguished from the Burt case, as well as all the other cases cited, because here we have to look to the charter as a foundation of the rights of the members of the corporation.

The principle has been frequently applied in cases where the beneficiary of an insurance policy has murdered the assured. It is held that, in such case, the beneficiary having by his wrongful act incapacitated himself to receive the benefit, the rule is to be applied which prevails where there has been no designation of a beneficiary, or where a designation has been attempted of one who cannot be a beneficiary; in all such

cases the courts will look to the charter of the company to find a beneficiary who can take.

The policy in this case is payable by its terms to the executors. The children, "heirs," are not mentioned in the policy. We have seen, however, that the heirs are among those who survive to membership in the company. Though they are spoken of as heirs, what is meant thereby, in the nomenclature of insurance law, is next of kin; in this case the infant plaintiffs, the children. They do not take under McCue in this aspect of the case, by inheritance; it would be misnomer to speak of heirs inheriting personal property; their claim is directly against the company; they are *persona designata*, the same as if they have been pointed out by name as the beneficiaries.

In *Miller v. Reed*, 64 Conn. 240, it was held that, under an insurance certificate payable to the heirs at law of the member, the proceeds of insurance belong to the beneficiaries, including the widow, and not to the estate of the insured; when the certificate is payable to the members' heirs, the words, heirs at law, having been used in their popular sense, applying to a class of persons.

In *Hodges Appeal*, 8 W. N. C. (Pa.) 209, 2 Ins. L. J. 709, where the word "heirs" was coupled with the words "legal representatives," in naming beneficiaries, they were regarded as equivalent to next of kin, and did not make the insurance money part of the assets of the estate.

In *Mullins v. Thompson*, 51 Tex. 7, it was held that a policy payable to heirs or assigns does not belong to the estate of the insured, and if no assignment had been made it will enure to the benefit of the heirs.

In *Thompkins v. Levy*, 87 Ala. 263, it was held that the word "heirs" as used in the policy must be held to mean distributees or next of kin, especially when associated with executors and assigns.

The line of decisions above seems to be unbroken. See *Words & Phrases*, Vol. 4, p. 3254, "Heirs."

"It is generally held that the 'heirs' take the proceeds as purchasers, so that in the absence of fraud the proceeds are not subject to the claims of assured creditors."

4 Cooley Briefs on Ins., p. 3729.

Where the assured makes a policy payable to his children, the law of Wisconsin, as stated in *Patterson v. Natural P. L. Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 903, is as follows:

"Upon the decision of this court in *Foster v. Gile*, 50 Wis. 603, such beneficiary has an actual subsisting interest in the policy, subject to the right of the insured, who has paid the premiums to vest it elsewhere; but, until such action by the assured, the interest of the beneficiary is such a vested, subsisting interest as would pass to the administrator of the beneficiary in case of his death."

This case notes a distinction which has been considered between an insurance payable to the children of assured and one payable to his estate, in case of suicide, and decides that there can be a recovery when the benefits accrue to the children.

This is the settled rule. 4 Cooley Briefs on Ins. 3226.

The courts have not been inclined to relieve the companies on the notion that a criminal act of a party interested has expedited the day of payment; on the contrary, where the letter of the policy cannot be performed, the beneficiary must be looked for in the company's charter or elsewhere, in order that a forfeiture may be avoided.

"Where there is no designation of a beneficiary, the person designated in the charter is entitled to the money."

Whitehead v. Whitehead, 83 Va. 153.

Where the beneficiary designated in the policy cannot take, the rule is the same as if none has been designated. The court will find a beneficiary if it can.

In *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412, citing *Alex. v. Parker*, 144 Ill. 355, 33 N. E. 183, it is held that, upon the death of a member, when the person claiming to be his designated beneficiary is outside of the classes eligible as beneficiaries, those who are within such classes are entitled to

insurance. There being no selection of a beneficiary authorized to take, the fund goes to them.

The following cases show that payment must be made in every case where there is any hand to receive it, and forfeiture is not to be tolerated. They support the doctrine that, in case of an illegal designation of the beneficiary named to take the insurance, the insurance may even revert to the estate of the insured, when there is no one else to take it.

Fuller v. Linzee, 135 Mass. 469; *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 10; *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495; *Newman v. Covenant Mutual Ins. Asso.*, 76 Ia. 56, 1 L. R. A. 659.

The case of *Cleaver v. Mutual, etc., Life Ins. Asso.*, 1 Q. B. D. 147, growing out of the Maybrick murder, referred to above, is authority for the proposition that, although the wrongdoer may not directly take the proceeds of his wrong, yet, if by a reasonable construction of the contract a forfeiture can be avoided, that construction must be adopted. Even if such construction result in establishing a trust fund for the benefit in part of the wrongdoer, yet this fact will furnish no defense to the insurance company. The facts in that case were these: James Maybrick insured his life in favor of his wife. The policy stated that in consideration of the sum mentioned therein the association received James Maybrick as a member thereof, and that the policy should be payable to Florence Maybrick, his wife, if living at the time of the death of the member; otherwise, to his legal representatives. Maybrick died by poison administered by his wife. She was tried, convicted and sentenced to death. Her sentence was afterwards commuted. By his will Mr. Maybrick appointed as his executors his brothers. After the death of her husband, Mrs. Maybrick assigned to the plaintiff, Cleaver, all her interest in the policy. The question to be decided was whether, if it were proved that James Maybrick died from poison administered to him by his wife, that would afford a defense as against Cleaver as assignee of Florence Maybrick,

as against Cleaver as administrator, under 33-34 Vict., c. 38, as against the plaintiffs, Thomas Maybrick and Michael, as executors of James Maybrick. It was insisted on behalf of the insurance company that they were not liable to pay the sum insured to the executors, because they would hold it in part as a trust for the wife, and his death was caused by the criminal act of his wife, and that it would be contrary to public policy, under such circumstances to compel them to pay the money to the plaintiffs. The Master of Rolls, whose opinion was supported by all the judges, in speaking of the application of the rule of public policy, said:

"When people vouched that rule to excuse themselves from the performance of a contract in respect to which they had received the full consideration, and when all that remains to be done under the contract is for them to pay the money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires. * * * The condition on which the money is to become payable is the death of James Maybrick. There is no exception in the case of his death by crime of any other person, not even by the crime of his wife. Therefore the condition expressed by the policy as that on which the money is to become payable has been fulfilled. Consequently, so far, and if no question of public policy came in, there would be no defense to an action against the defendants by the executors of James Maybrick. Apart from the statute, what would be the effect of making money payable to his wife? It seems to me that, as between the executors and defendants, it would have no effect. She is no party to the contract, and I do not think the defendants should have any right to follow the money they were bound to pay and consider how the executors might apply it. I think that if the court were to deprive the children of the insured, who do not claim through the mother, of the insurance money under such circumstances, on the ground of public policy, it would be gross injustice. Any one claiming through the wife is shut out by the rule of public policy, so that any assignee or other person claiming through her cannot recover the money; but the

rule of public policy does not apply as between the executors representing the estate of the insured and the defendants, and, therefore, their rights and liabilities must be governed by the contract."

Fry, L. J., in delivering one of the opinions of the unanimous court, said:

"The executors of James Maybrick, it is said, are suing as trustees for Florence, and can have no better title than their cestui que trust; it is said it is against public policy to allow a criminal any benefit by virtue of his crime; she is, therefore, disentitled to claim the proceeds of the policy in question, and the executors, who are her trustees, are equally disentitled. This line of argument appears to be equally untenable, whether there be or not such a principle of public policy as that stated. * * * It may be argued that, having regard to the fact that Mrs. Maybrick is the prime object of the insurance, and that she is named on the face of the policy as payee, the contract of insurance must be taken to imply an exception in the case of the death of the insured when caused by the crime of the person so named; and it is suggested that Fauntleroy's case in the House of Lords supports this contention.

"This argument does not appear to me to be tenable. The policy is effected under, and therefore affected by, a statutory enactment, the effect of which in the present is to vest the policy in the executors of the insured as trustees, in the event of Mrs. Maybrick's being entitled to claim, in trust for her, and in every other event in trust for the estate of James Maybrick, just in the same way as if before the statute, the policy had been taken out by James Maybrick, and he had by a separate instrument declared the like trusts of it. Now, it is to my mind illogical to make the crime of one cestui que trust a bar to the claim of another, or of the trustees for that other cestui que trust, and if the supposed defense were to prevail, we should so hold. If Mrs. Maybrick had inflicted a mortal, but not intentionally fatal, wound on her husband, had then committed suicide, leaving him surviving, and his executors had claimed on his death, it appears to me that the crime which caused his death would have fur-

nished no defense. In a word, I think that the rule of public policy should be applied so as to exclude the criminal and all claiming under her, but not so as to exclude alternate or independent rights."

In the case of *Schmidt v. Northern Life Asso. (Ia.)*, 51 L. R. A. 141, cited with approval in the *Cleaver* case, the defendant issued a certificate of insurance on the life of Claus Behrens payable to his wife, his heirs or legal representatives. The wife of the insured caused his death by administering poison. The company denied liability on the ground that, as the beneficiary took the life of the assured, she should not recover, nor could her assignee, who was a party to the suit brought by the administrator to recover upon the ground that, under the contract payable to a designated beneficiary, they could be liable to no one else, and the beneficiary having taken the life of the assured, her rights had been forfeited. The court said:

"We now come to the case made by the administrator and the more important and controlling question hitherto stated. Public policy, as we have seen, forbids an action on behalf of the beneficiary or her assignee. But what becomes of the benefit promised to be paid on the death of the assured? Is the company absolved from all liability because of the murder of the assured, or must it pay the amount to some one, and if so, who? Neither the beneficiary nor her children (Mrs. Behrens, the wife, was living at the time the case was decided), nor her assignee can recover because of the wrong perpetrated by her, but does her wrong absolve the association from liability? We think not. There is no provision in the certificate that it should be forfeited in the event the assured was murdered and no condition of any kind against murder."

The court continues:

"Defendant obligated itself to pay on the death of the assured, and it ought not to be held that the act of the beneficiary forfeited all claim under the policy. The wife cannot recover because it is contrary to public policy to

allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy.

"We have seen that where there has been no designation, or an illegal designation, or a designation of a person as beneficiary, who dies before the death of the assured, the association holds the money in trust for the benefit of the estate of the insured. Following this doctrine to its logical conclusion, it seems that, when the beneficiary named is prohibited from taking because of her own wrong, a trust arises that will be enforced in the proper case. * * * Moreover, the fund was created or collected by the defendant for the benefit of the persons or classes named in the statute. True, it is to pay this fund to such person or persons of this class as may be designated by the assured, but if no one is selected, it is, nevertheless, a trust fund to be paid to the estate of the assured. * * * The interest in the benefits to which the assured was entitled from the association was not destroyed. We have no occasion to determine whether or not Mrs. Behrens can take anything through the administrator, as that question is not before us."

In the well-considered case of *Supreme Lodge v. Menkhäusen*, 209 Ill. 277, 70 N. E. 567, 101 Am. St. Rep. 239, the insurance certificate was issued upon the life of Elizabeth Menkhäusen, payable at her death to her husband, who willfully murdered the insured, and was sentenced to be hung. The sentence was commuted. The suit was by the children and heirs-at-law of the deceased. The defense of the company was placed upon the ground that appellees had no right, title or interest in the benefits, or any part thereof and could not maintain any action thereon, and that the murder of the insured by the beneficiary was not one of the risks insured against. The court confirming the judgment of the lower court in favor of the plaintiff, said:

"The contract between the society and the insured contained no provision absolving the society from liability in the event that she was murdered by the beneficiary,

and public policy does not require us to read such a condition into the policy. If societies of this character desire to be protected from such contingency that object must be accomplished by a condition to that effect written into their contract, failing which the law will not absolve them from liability. In the absence of a contract to that effect public policy will not permit the society to appropriate unto itself the fund which it has agreed to pay, merely because the life of the insured has been unlawfully taken. We think the correct view to take is that Gustav Menkhausen, by his act in taking the life of his wife, placed himself outside the classes from among whom she might designate a beneficiary, and he could not, therefore, take the fund, or any part thereof, either as beneficiary named in the certificate, or as heir at law of his wife. The situation so far as his rights and those of appellant and appellee are concerned, we think is precisely the same as though, after the issuance of this certificate, he had been divorced from his wife, and she had thereafter died without having any alteration made in the certificate, but the proceeds thereof would be payable to the heirs of the insured, nothing to the contrary appearing in the certificate, the Constitution and by-laws of the order of the laws of the State under which it operates."

Citing *Tyler v. Odd Fellows, etc.*, 145 Mass. 134.

Schenfield v. Turner, 75 Tex. 224, 7 L. R. A. 189.

Order Ry. Conductors v. Coster, 55 Mo. App. 186.

Schmidt v. Northern Life Asso., 51 L. R. A. 141, 84 Am. St. Rep. 323.

Cleaver v. Mutual, etc., Asso., 1 Q. B. 147.

The court continues:

"In both of the cases last cited it was held that the fact the beneficiary had murdered the insured did not cancel the obligation of the insurer, and in both cases the administrator was allowed to recover, on the theory that the insurer held the fund in trust for the estate of the deceased."

Patterson v. Natural Premium Life Ins. Co., 100 Wis. 118, 69 A. S. R. 899, is a Wisconsin case. There it was held that although the insured feloniously took his own life, there was nothing to prevent a recovery by the beneficiary.

In *N. Y. L. Ins. Co. v. Davis*, 96 Va. 737, a policy issued to Davis for benefit of his estate was assigned to Lester. Davis was murdered by Lester. On the bill in equity filed by the administrator of Davis against the insurance company and Lester, held: Policy payable to the administrator of Davis.

From the authorities cited and from the absence of authorities to the contrary, it is settled that where for any reason a beneficiary designated in the policy cannot take, the insurance company may not retain the insurance money contracted to be paid by it, for the risk for which it has been paid. The money will be paid first to such person as may be pointed out in the charter or the by-laws of the company, and if there be none such, the money will be paid to the executors or administrators of the estate of the insured, although neither by the terms of the contract when made, nor afterwards, did either party contemplate such payment.

On this theory the infant plaintiffs would have a plain right to recover.

It is not, of course, claimed that the terms of this contract are not broad enough to include death by every means which would include death by hanging as well as death from whooping-cough. On the contrary, such a construction does violence to the terms of the policy, for by its terms only one means of death is excluded, namely, suicide in a year after its date, while by this construction there are two means of death which are excluded. The only reason for excluding death by hanging is, as is said, it would be illegal to contract for payment upon such a contingency and hence, the presumption being in favor of innocence, it is to be presumed that death by that means was not included. This presumption is created, not for the benefit of the insurance company, but solely for the purpose of preventing a construction of the contract which would make it include an illegal agreement. Consequently if there is any party interested who occupies the relation of an innocent third person to whom payment can lawfully be made,

there is no reason why it would be illegal for payment to be made to such party and as in that event the reason would cease for the presumption that death by hanging was not included in the risk, the presumption itself would likewise cease. Now, it appears from the charter of the company that the beneficiaries of this insurance are McCue's assigns, if he has any, if there are no assigns then his executors and next in order his children. There are no assigns, and the executors, it is said, cannot take, consequently the right goes to the children unless there is some reason of public policy why the children shall not take.

There are practically no authorities denying a recovery in case of death by suicide, which is a much stronger case than the case at bar, when special beneficiaries, such as children, are designated.

The rule is thus stated in Cooley Briefs on Ins., 3226, sustained by a long line of decisions:

"Conceding that the rule is as stated in the Ritter case (109 U. S. 139), when the policy is payable to the insured or his personal representatives, it is nevertheless settled rule that where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true though the contract is that of a mutual benefit association under which the insured has the right to change the beneficiary."

This is distinctly declared to be the law of Wisconsin in a case in which there was a recovery in a policy payable to the children of the assured who met his death by suicide. The case is distinguished from the Ritter case in which a recovery was denied to the personal representatives of an assured who died by suicide. *Patterson v. Natural Premium L. Ins. Co.*, 100 Wis. 118 (69 Am. St. Rep. 899):

"Conceding the strength of the arguments upon public policy on which the Ritter case is based, we still think, in view of the prior decisions above cited to the contrary

of the rule there laid down, and the general apparent acquiescence in those decisions, that, in cases where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us."

We have seen, moreover, if this policy had been payable to some third person, as an assign, and he had murdered the assured for the very purpose of maturing payment, which is the strongest case possible for applying rules of public policy, yet such fact would not have prevented recovery by other beneficiaries named in the charter and by parity of reason there is no principle which would prevent a recovery here by the children "who," as stated in the Patterson case, *surpa*, "could not, if they would, prevent the act of the assured."

This view of the case not only affords a ground on which we think all of the authorities can be reconciled, but it is founded on sound elementary principles. These principles, as we have seen, are recognized in Wisconsin, and they are also distinctly approved in Virginia; they are, in fact, recognized everywhere and constitute the general commercial law on this branch of insurance.

Moreover, it is to be observed that even in the Amicable case, as will be seen, the company, while insisting that Fauntleroy and those claiming under him had forfeited their rights by his attainder, yet by its answer submitted to the court whether his majesty's attorney-general should not be a party so that there could be a judgment in favor of the crown for the amount of the policy.

Cardwell v. Kelley, 95 Va. 573, was a suit in behalf of the creditors of an insolvent corporation to recover on unpaid stock subscriptions. The defense was that the contract of stock subscriptions involved an agreement for the distribution among the subscribers of lots of unequal value, which was a

lottery, and hence the contract was illegal and not enforceable on grounds of public policy.

The court referred to the statement of Lord Mansfield in *Montefiori v. Montefiori*, 1 W. Bl. 36, and which was repeated by Broom in his work on Legal Maxims that "it is an indisputable proposition that as against an innocent party no man shall set up his own iniquity as a defense, any more than as a cause of action." And it was held that as this was not an action by the corporation, one of the guilty parties, seeking to enforce the payment of illegal subscriptions but an action for the corporation, a recovery should be allowed. The court applied the familiar principle that illegal contracts will be enforced where by doing so, the interest of society will be promoted by discouraging parties from making such contracts.

"If the corporation was seeking to recover the subscription, and was solvent, then, inasmuch as its payment would enable the unlawful design of a lottery to be carried out, it would be proper to allow the defendant to show the unlawful purpose, in order to defeat the transaction and prevent similar ones in the future; but to allow him to do so after it has become insolvent would confer immunity from liability on the guilty, and not restrain, but encourage, such illegal schemes."

If these principles are applied to the case at bar they permit the contract to be construed as it is written, broad enough to cover death by any means, without the necessity of resorting to a forced construction to the terms of the contract by which an exception is to be implied by operation of law when such exception does not exist in point of fact. At the same time it meets the ends of the alleged public policy by discouraging the making of contracts which by their terms include death by hanging, because to deny payment to the beneficiary named in the policy would, it is said, defeat the purpose of the assured and thus discourage him from such transactions, while to require the company to pay would certainly discourage it from making such contracts. On the other hand, to deny the

liability of the company would encourage insurance companies to continue to make contracts which by their terms are broad enough to cover death by hanging, for they would by this means be permitted to retain the consideration paid for such contracts and be granted immunity by the courts against their obligation. So that by making payment to the children, who are not the beneficiaries named in the policy but base their rights entirely on the company's charter, and who are not particeps criminis, the true objects of public policy are obtained.

V. The cases cited do not militate against recovery on the principles above set out.

The first case in which questions of the effect of public policy on insurance where the insured died at the hands of the law, is the case of *Amicable Soc. v. Bolland*, sometimes called *Fauntleroy's Case*, 4 Bligh. 194. It was cited and relied on in the case of *Burt v. Union Central L. Ins. Co.*, 187 U. S. 372, 42 L. Ed. 316, as the only case in point.

In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of July in the same year, he committed a forgery on the Bank of England; he continued to pay the premium upon this insurance for a considerable period of time; in the year, 1824, he was tried; on the 29th of October in that year he was declared a bankrupt and assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery, was found guilty and sentenced to death and in the month of November following was executed.

It was held that the company was not liable.

The answer of the defendant company admitted that the policy was a valid and subsisting policy up to October 30, 1824, (the day of conviction) or up to October 23, 1824, the first day of the term at which the assured was tried and convicted. The assignment was made *October 29, 1824*.

Further, the answer submitted that upon the attainder of Henry Fauntleroy for felony he ceased to be a member of the society, by reason whereof and also by reason of the fact that the death of Henry Fauntleroy was the direct consequence of, or was occasioned by his own felony no claim could be made &c.

"And the appellants submitted to the judgment of the court whether, under the circumstances, his majesty's attorney-general ought not to have been a party to the suit."

Counsel for the society argued:

It is against public policy that the assured or those claiming in his right should recover for a loss caused solely by his criminal act.

That Fauntleroy ceased to be a member upon his attainder and hence at the time of his death had no interest in the funds, and respondents could not recover as assignees of a person all of whose rights were vested in the crown by attainder.

It is perfectly apparent that the law of attainder exercised a controlling influence in the decision of this case. Before considering the reasoning on which the court based its decision we will briefly consider the principles of attainder.

At common law a person attainted of felony or treason forfeited all his right, title and interest in and to all property of every description to which he was in any way entitled. The same rule applied to cases of outlawry, and where one became by his own act *felo de se*.

The policy of the law in exacting these forfeitures is thus expressed by Bacon:

"The policy of the law herein is to make men more mindful of their allegiance and deter them from taking up arms against the crown, for as the mutual love men have for their posterity often restrains them from action which would prejudice their posterity by entailing the infamy of such action on them or making them sharers in the punishment which the law has appointed for such offender, so men are more careful of their person when

their miscarriage will involve their children in the guilt of punishment of them." Bacon Abr. 35.

In 3 Thomas Coke 567, it is said that the punishment against a man for felony is death, but *implicative* (as hath been said) he is punished by a forfeiture of all of his estate so that no one can take under him as his successor. The policy of this harsh law is given: "And thus severe it was at common law; *ut poena ad paucos, metus ad omnes perveniat*. And it is truly said, *etsi meliores sunt quos ducit amor, tamen plures sunt quos corrigit timor*."

It is apparent then that the policy of the law of attainder was that it should be enforced because it was regarded as a restraint operating on the minds of men against the commission of crimes, through their interest in their posterity and the welfare of their connections.

The forfeiture never applied to any one not claiming through or under the attainted felon.

Keeping in mind this principle of public policy, the influence of the law of attainder on the decision in the Amicable case is obvious. The opinion is as follows:

"The question under these circumstances is this, whether the assignee can recover against the insurance company the amount of this insurance, that is to say whether a party effecting with an insurance company an insurance upon his life and afterwards committed an act of felony, being tried, convicted and finally executed, whether the parties representing him and claiming under him can recover this sum. I attended to the argument in conjunction with the noble Lord now present and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple thing. Suppose that in the policy itself this risk had been insured against; that is that the party insured had agreed to pay a sum of money year by year upon condition that in the event of his committing an act of felony and be executed and tried for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract should be sustained; is it

not void upon the plainest principles of public policy; would not such a contract, (if available) take away one of those restraints operating on the minds of man against the commission of crimes, viz., the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it, in express terms, cannot on the ground of public policy be sustained, how is it to be contended that in a policy expressed in such terms as the present and after the event which happened, we can sustain such a claim?

"Can we after considering this policy, give to it the effect of that uncertainty which if effectual in terms have rendered the policy at least void. Upon this sure and plain ground in the discussion of this case, I think that this policy cannot be sustained and that the respondents are not entitled to recover."

This case does not establish that to pay the money would be against public policy as an encouragement to crime, but the whole argument was this: that to sustain a contract on the express condition of payment upon being executed for felony would operate to thwart the policy of the law of attainder, for the execution of the felon would provide an estate for those whom the law attempted to punish by forfeiture of all estate derived from him and thus one of the supposed restraints upon the commission of crime would be removed, the result would be the same, of course, whether the condition were expressed in the policy or not. It would be a contract to circumvent the policy of the law. This public policy punished the criminal by taking the estate away from his connections. The contract provided an estate to be given them upon the very contingency which the law said should result in taking it away from them. If the contract stands the criminal could by his own contrivance escape in part the punishment which the law imposed. This plainly would be against public policy as it then existed.

It has frequently been attempted to apply the *words* used by the court to cases in which the conditions were totally dissimilar. If we follow merely these words, losing sight of the principle involved, the result will be erroneous conclusions,

while the principle is right when properly applied. The principle of the Amicable case has no possible bearing on the one in judgment, because the law of forfeiture by attainder has been abolished by statute both in Virginia Code, 3883 and 3884, and Wisconsin, *State v. Duckett*, 90 Wis. 272, and by Act of Congress, April 30, 1790, sec. 24; Story Law (U. S.) 88. Thus the only principle of public policy on which that case was based has been taken away by express action of the Legislature of both States and of the United States.

Even in England in case the reason controlling the law of attainder was lacking the courts have not recognized the Amicable case as authority for the proposition that an insurance contract is void when made payable upon the express condition of death under conditions forbidden by public policy and punished by law. For instance the estate of a suicide was forfeited by attainder, but where a policy was expressly payable in case of death by suicide, but the beneficiary was one whom the attainder would not effect, it was held that there was no principle of public policy forbidding a recovery.

In the case of *Moore v. Woolsey*, 4 E. & B. Q. B. 243 (82 E. C. L.) the policy contained the following stipulation:

"8. Policies effected by persons on their own lives who shall die by duelling, or by their own hands, or by the hands of justice, will become void, as far as regards the executors or administrators of a person so dying, but will remain in force only to the extent of any previous interest which may have been acquired by any other person under an actual assignment by deed, for a valuable consideration," etc.

Thus it seems that the policy expressly stipulated for the payment on the condition which it is said the Amicable case would make void if the element of attainder be eliminated. The assured came to his death by suicide. The Amicable case was referred to in the argument. Lord Campbell, C. J., after stating that it was argued that if the eighth condition were construed as fixing a legal liability on the company, the con-

dition was void, and, indeed, that the whole policy was tainted with invalidity, proceeds to lay down a rule which is directly antagonistic to the principle which it is contended was established by the Amicable case. His language in deciding the question at issue is as follows:

"Where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee. On the demurrer to the second replication, therefore, we think there ought to be judgment for the plaintiff."

Thus it will be seen that, from the standpoint of reason and authority the Amicable case does not establish any principle controlling this case. This result is apparent certainly as far as the infant plaintiffs are concerned, not only because they do not claim under McCue, but is still more apparent when the effect of abolishing attainder is considered, and this view is strengthened when the change in modern thought and decisions and the public policy affecting life insurance between the time of the decision of the Amicable case and the present is taken into consideration.

At the time of Fauntleroy's execution a forfeiture of all of his property rights as a part of the punishment for crime was simply in accordance with the public policy of the law of England. The reasoning in the case is to the effect that if a clause should be inserted in the policy indemnifying the insured against loss upon the commission by him of a felony and his execution in consequence thereof there could be no recovery, and there could likewise be no recovery in the absence of such clause. Eliminate the effect of attainder and the argument is not sound. Its fallacy would consist in the fact that if there had been in the policy a clause expressly conditioned upon payment in the event that the insured committed a felony and should be executed therefor, the invalidity of the policy would result from the illegal conception in the minds of the parties *at the time of its execution*, but when there is no such clause in the contract it cannot be said that there was such an illegal object in the mind of either party. On the contrary, the presumption of the law is in favor of honesty of intention. *Dowley v. Shiffer*, 36 N. Y. S. R. 869, holds: "In the absence of proof of corrupt intent the courts are bound to presume that the intentions of the parties were honest." In order to extend the Fauntleroy case to reach the rule of public policy now claimed for it, it must to say the least of it, be assumed that Fauntleroy forged a note in order that he might be hung, in order that another, his assignee, might benefit. Such a conclusion cannot be reached without a belief of the incredible. Insurance is effected because of the fear of death and the loss consequent upon its happening, and not for the purpose of suffering the most ignominious of all deaths in order that others may benefit. Lord Campbell, C. J., in *Moore v. Woolsey* (*supra*), spoke of this as "a very remote and improbable contingency." In the case of *Lodge v. Menkhausen*, 101 A. S. R. 239 the court uses this language:

"Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential."

In *Sun Life Ins. Co. v. Taylor* (Ky.), 56 S. W. 668:

"It is not reasonable to suppose that a party would take out a policy of insurance with a view of losing his life by his criminal action three years after the date of the policy."

In *Harper's Admr. v. Ins. Co.*, 19 Me. 506, Judge Scott, discussing this question of public policy, says:

"In life policies the insurer has a guaranty against increasing the risk by that love of life which nature has implanted in every creature."

The same language is quoted with approval by the court in *McDonald v. Triple Alliance*, 57 Mo. Ap. 87.

Public policy varies with the changing opinions of the time. In nothing has public opinion changed in a more marked manner than on the subject of the restraint which it was deemed necessary for the prevention of crime. The decision of the *Amicable* case was based on a notion that to allow a recovery on the policy would remove one of those restraints operating on the human mind against the commission of crime. The philosophy of the old common law was that the inclination and natural tendency of men was toward the commission of crime and the safety of the State required this tendency to be repressed by measures most strict and severe. Blackstone says that in his day there was not less than one hundred and sixty offenses for which death was looked upon as the only effective restraint. This barbarious notion, as to the evil tendency of man and the extreme and severe measures necessary to restrain them from crime, had not passed away from the English law when *Fauntleroy* was executed for *forgery*, in the early part of the last century. Opinion on this subject, however, has totally changed since then; so much so, that in some of the States of the Union capital punishment is entirely abolished, and in England is inflicted but for two offenses. We conclude, then, that to follow the reasoning of the *Amicable* case, based on restraining the commission of crime, would be sticking in the bark of an exploded theory. Whatever might

have been its supposed effect then, reason denies that it may have such an effect now.

The next case which should be discussed is *Burt v. Union Central*, 187 U. S. 372, 47 L. Ed. 216, which is relied on by counsel for appellant as controlling. But the distinction between that case and the case at bar must be evident from what has been said.

In the first place, the court there was not considering the public policy of Wisconsin. The company was an Ohio Company. (See policy filed with the record in that case.) And the insured was a resident of Texas. The case then determined no more than the public policy of the state of that obligation.

In the *Burt* case, it did not appear that there had been any legislative pronouncement of public policy nor had the courts defined the public policy governing contracts of this order. In the case at bar, on the other hand, it appears that the legislature has authorized the making of this contract and the courts of the state of the obligation have decisively held that the obligation is not subversive of the public interest.

In the second place, no question as to whether or not such a risk could form the basis of a contract was presented to the court for decision.

It was admitted in the case that the policy did not include the risk if the person insured, when in sound mind committed the crime of murder for which he was executed, and the question before the court was whether the judgment of the court by which *Burt* was convicted, was final on this question. The rule of the United States Court is that points discussed but not necessary to judgment are not binding in subsequent cases. *St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 404 (36 L. Ed. 753); *Carroll v. Carroll*, 16 How. 275, 286.

In *Cross v. Burke*, 146 U. S. 82 (36 L. Ed. 896), the court in considering a plain expression in a previous case as to the effect of a statute on a question of jurisdiction, said:

"But the question of jurisdiction does not appear to have been contested in *Wales v. Whitney*, and where this is so the court does not consider itself bound by the view expressed."

Now, in the Burt case, the question in issue here was not only not contested, but it was distinctly admitted, by the pleadings and by counsel at the bar (see brief of counsel, 49 L. Ed. 216), that it was not involved in the case at all. The question then arises, what is the effect of this admission that the policy did not include the risk of death by execution for a crime of which the assured was guilty?

2 Wigmore on Evidence, § 1064:

"The pleadings in a case are for the purpose of use in that suit, not merely ordinary admissions, but judicial admissions, i. e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits."

An express waiver made in court has the effect of a confessional pleading. 4 Wig. Ev., § 2588.

When the legal effect of an instrument is solemnly admitted under the advice of counsel learned in law, such admission is satisfactory evidence of its legal effect. 1 Greenleaf on Evidence, § 97.

It seems evident from the foregoing that the question as to the effect on the policy of death by being executed for crime was not put in issue in the Burt case, and a consideration of the question was not necessary for the judgment, consequently what was said by the court on that subject is not binding authority in this case.

The case itself affords a good illustration of the wisdom of this principle; for not only did the plaintiff's counsel admit the general rule that there could be no recovery in case of death at the hands of the law, but he cited authorities to sustain this position. Counsel for defendant did not of course controvert

this admission—and the authorities relied on by the court consisted entirely of those cited by plaintiff's counsel. A more careful consideration would have shown that these authorities did not sustain the point, yet no such consideration seemed necessary in regard to a proposition on which counsel for both sides were agreed. Any court is likely to be misled by the error of counsel under such circumstances, so that the view expressed would be founded in the erroneous opinion of counsel and not in the real judgment of the court. The court ought not to feel bound under such circumstances unless the case is clearly within the rule of *stare decisis*.

The Burt case can only be regarded as binding authority here by holding that, in that case, in order to reach a judgment against the plaintiff, it was necessary to decide every question, which, under the facts presented in the record, could sustain a recovery by the plaintiff, whether such question was included in the issues submitted to the court or not. A brief consideration will show that such reasoning would give too great an effect to this decision.

The original record in the case shows that the policy contained an "incontestible clause." (See appendix *infra*.) This clause would be equal to an express condition that no defense could be made on the ground here relied on. Yet it will hardly be urged, however broad the language used, that the Burt case is an authority against the validity of the incontestible clause in view of the authorities universally sustaining it, even where there is fraud in the procurement of the policy. *Patterson v. Ins. Co.*, 100 Wis. 118, 75 Nev. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Clement v. Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *Mass. Ben. Asso. v. Robinson*, 104 Ga. 256, 30 S. E. 919, 42 L. R. A. 261; *Franklin Ins. Co. v. Villenue*, 25 Tex. Civ. App. 356, 60 S. W. 1014, 68 S. W. 203.

When the plaintiff's counsel admitted that he could not recover if Burt was properly convicted, he withdrew from the issue all question of the effect of the incontestible clause and

likewise withdrew from the issue all question as to the effect of an execution under a proper judgment of conviction, leaving nothing to be decided except this: Conceded that if the assured was guilty the policy would be avoided, was the judgment of conviction conclusive of his guilt? It was not necessary to decide the point conceded; the question submitted, and that alone, was all that was necessary to be decided. And the case is authority for nothing except that the decision of the criminal court was conclusive of the question of guilt.

Thirdly, in Burt's case, the right of recovery was determined solely on terms of the policy which did not give rights as a member of the company. In the case at bar the right of recovery is determined by the charter, a special act of the legislature. The right of recovery in Burt was necessarily sought in customs and traditions of the people which were admitted to avoid the policy as to this risk. Here is no question of customs or traditions, but the rights are determined by legislative enactment. The executors or children take because their rights have been set forth as members of the company, not as claiming through the insured under the policy. The devolution of McCue's rights upon his death are not a matter of contract, but of legislation. Then no question of public policy can enter in, but the provisions of the statute are to be enforced as a conclusive declaration of public policy.

Finally, the Burt case involved only the right of the murdered to claim. It did not involve the right of the company to escape payment. For the action there was brought by the assignee of the murderer. Here, on the contrary, the innocent third parties seek to recover this money. The murderer in the Burt case had by his act excluded himself from participation. But here the plaintiffs have done no wrong. Under the stipulations, the question here is whether the company can escape the payment which it has obligated itself to make. In the Burt case the plaintiff's individual right only was in issue.

We have seen that although the murderer may not claim, the company is not necessarily absolved from payment, but

that the company will be required to make payment to those outside the guilty class. Public policy is not subverted in the retention of the money by the company, but a denial of benefit to a wrongdoer. Hence, where the claimant is not within the guilty class, as are not the children here, payment should be made.

The case of *Ritter v. Mutual L. Ins. Co.*, 109 U. S. 139, 42 L. Ed. 693, does not militate against a recovery in this case.

Recovery there was sought by the estate of the insured, who had committed suicide. Here recovery is sought by innocent parties who claim under provisions of the charter.

Where recovery is sought by the children, it is the settled rule that the suicide of the deceased does not absolve the company.

Cooley, *Briefs on Insurance*, p. 3226, collecting the cases, thus sums up the result:

"Conceding that the rule is as stated in the *Ritter* case (109 U. S. 139), when the policy is payable to the insured or his personal representatives, it is nevertheless settled rule that where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true though the contract is that of a mutual benefit association under which the insured has the right to change the beneficiary."

And such is the settled law of Wisconsin, *Patterson v. Natural Premium Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, where the court says:

"Conceding the strength of the arguments upon public policy on which the *Ritter* case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy

to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us."

In the Ritter case the court, in considering the question of suicide generally, rested their conclusion on two grounds: First, that it was not in the contemplation of the parties that the company should be liable where the insured, in sound mind by destroying his own life, "intentionally precipitates the event upon the happening of which such liability was to arise," and second, that payment under such conditions would "encourage the assured to commit suicide."

Neither of these arguments apply to a policy payable in case the assured is hung. In the latter case the element of intentional injury to the insurance company is lacking. The murderer does not intend to accomplish his own death, he hopes to escape, and statistics, as well as common knowledge, show that the chances are greatly in favor of his escaping death. So in the latter case the intentional wrong, that is to say the fraud, against the insurance company is neither intended nor certain to occur and there is no more reason why payment should be refused in such case than there is when the assured by any other means exposes himself to the risk of death.

In suicide cases it is sometimes said that recovery should be denied by analogy to the case where a person insured against fire burns his own property. In the latter case the wrongdoer would become the direct beneficiary of the injury to the company which is the immediate consequence of his own intentional wrongful act. There is a partial analogy to a suicide case in this, that the intentional act of the assured produced the injury to the company, but in case of death by hanging this element is lacking, as we have seen. In the latter case the death of the assured is not the intended result of his wrong. The analogy is closer to that of a fire caused negligently, but not intentionally by the assured, in which case he can recover. Argument by analogy is unsound unless the analogy is com-

plete. Here there is lacking another important element; namely, actual benefit to the wrongdoer. We can best present this view by a quotation from the case of *Campbell v. Supreme Conclave* (N. J.), 54 L. R. A. 576, 578:

"No one in this world can derive a benefit by his own death. By that final event all earthly profit ends for him to whom it comes. He is for this life equally beyond gain and loss, and as to him the rules that govern mundane intercourse become no longer applicable. Those who derive the benefit will have done no wrong."

The case of *Plunkett v. Supreme Conclave*, 105 Va. 643, is a case of suicide and relies on the *Ritter* case and the *Burt* case as authorities. It is distinguishable from the case at bar on the same grounds as are those cases.

In regard to the statement that payment of life insurance might encourage suicide, it is possible to conceive how one tired of life and oppressed by care might adopt life insurance, accompanied by suicide, as a means of providing for his family, but our mind refuses to follow to the point where it is said that a reasonable man will commit murder for the purpose of being hung that others may get the insurance money. The same generous impulse which would lead one to lay down his life for a friend, and the deliberate and malicious purpose which would lead one to commit the crime of murder, merely for the pecuniary benefit of another, cannot exist at the same time in the same breast. And if such a purpose should be formed, what would become of the chances which are greatly in favor of escaping death and being punished by confinement only? One seeking death for such a purpose would adopt a more certain method. Of all the motives which have ever been developed as inducing the commission of murder, we feel safe in saying that the facts of history fail to authenticate that such a motive as this has ever been shown to exist and we have found no case in which one has had the hardihood seriously to suggest such a motive in a prosecution for homicide.

An analysis of these authorities cited as militating against

recovery in this case, shows that they do not sustain the position. Each case presents features which distinguish it from the case at bar.

It is not necessary in the discussion or decision of the case at bar to criticise the rulings in any previous cases. The principles on which we seek recovery present no conflict with the prior decisions. At the same time, it is not improper to consider the relation of those cases to other settled principles.

The doctrine that an exception must be implied in a policy of life insurance as to the risks of death by execution for crime takes its rise in *Fauntleroy's Case*, *supra*. Then truly it might be said that payment to heirs on execution for crime was against public policy, for it was the purpose of the law of attainder that the heirs of one guilty of crime should be left destitute. But with the abolition of the law of attainder, the policy which such a contract has subverted is gone.

The effect of such a contract on the public interest is thus stated by the Supreme Court of Illinois in *Collins v. Metropolitan Life Ins. Co.* (1908) (Ill.), 83 N. E. 542, a case presenting facts identical with the case at bar:

"It is said by the defendant in error that to permit a recovery on this policy would be contrary to the public policy of this state, as it would tend to remove a restraint thrown around persons who are tempted to commit crimes. The argument rests upon the same grounds that were urged centuries ago in support of the now obsolete doctrine of attainder and corruption of blood. In the earlier history of the common law various consequences other than the punishment of the offender followed conviction for felony, and in some instances the causing of a death by mere misadventure or negligence was visited with certain forfeitures and penalties. * * *

"These ancient doctrines, whether resting upon grounds of public policy or upon the other reason which is sometimes put forth, that the government is entitled to the goods of a felon as compensation for the injury done and the expense occasioned, have failed to satisfy the conscience and judgment of courts of later periods in England, and

have never had a potential existence in American jurisprudence."

If it be true that public policy requires a condition to be implied that the policy is not to be paid in case of the death of the assured produced by his own crime, it would not be the manner of death but the commission of the crime resulting in death which brings this rule into operation, and hence the rule, if sound, ought to apply to all those cases in which the assured dies while engaged in or in consequence of, violation of law. It is the uniform practice, however, to allow a recovery in the cases last mentioned in the absence of a clause specially excepting such causes of death. Not only so, but when there is such clause of exception, it is held that they are subject to the same rules of strict construction as any other clause in the policy inserted for the benefit of the insurance company. See 4 Cooley's Briefs on Ins., 3142 and seq. The effect of these decisions is necessarily to negative the theory that such a condition is to be implied.

In the case of *Halch v. Mut. L. Ins. Co.*, 120 Mass. 550 (21 Am. Rep. 541), where the assured died as the result of a criminal abortion, death in consequence of violation of law was expressly excepted. And we find no case saying that where the assured dies in consequence of violation of law there is an implied condition against payment except in the single case of the assured being executed by law for the crime. What good reason is there for making an exception in this case? The argument is that it would be immoral, illegal to contract for payment to be made on the condition of the policy being matured as a direct result of the violation of law by the assured. If this rule is sound, it ought to apply to all cases within the reason of the rule. It is not the fact of the death or the manner of the death, but the violation of the law causing the death, which affords the reason of the rule. That no right can arise from a violation of law is the fundamental postulate from which the rule of law is said to result that the condition against payment is to be implied. How can it matter, then, whether

the violation of the law from which death results is a violation of a civil or a criminal law? Or if it must be a criminal law, how can it matter whether it was a misdemeanor or a felony? Or if it must be a felony, how can it matter whether it was a capital felony or only a penitentiary offense? The cases cited in Cooley's Briefs (*supra*) show that a special exception is necessary to prevent payment in these cases, yet death has resulted in consequences of all of them and the alleged rule of public policy is broad enough to cover them all, yet it is attempted to be applied only in cases of judicial execution. Can there be any good reason for this exception to the general rule? Does not the result which is reached disprove the soundness of the argument as applied to the life insurance? The danger is that, under the unconscious but natural influence of the reasonable antipathy that all men feel towards a convicted murderer and those connected with him, due consideration is not given to the true principles controlling this important question, but the old idea of forfeiture by attainder has been permitted to give color to the opinion on the subject.

The true principle of public policy controlling contracts of life insurance is that they are intended to make provision for those dependent on the assured when they are deprived by death of his support and that this provision ought to be real and not merely delusive. The needs of dependent children are no less because their father is hung, but such a tragedy, by diminishing their advantages and opportunities in life, greatly enhances their needs and condition of dependence; and when the policy does not stipulate for the commission of crime when it had no interest, public or private, is prejudiced by the payment, when the terms of the contract are broad enough to include this payment, when there was no illegality contemplated at the time the contract was made, it should require something more than mere technical reasoning to read into the contract an exception which neither party actually had in mind and thus to deprive these children of the benefits promised to them. They ought to be allowed to recover even in the ab-

sence of the acts of Legislature bearing on the subject, but when these statutes and the principles governing them are considered, the liability seems complete.

The present policy of the law is to require of insurance companies a strict liability for their losses. This is shown by,

1. The course of judicial decision.

The courts have recognized the necessity of applying liberal rules of construction to the contracts acknowledging the vastness of the institution, in which it is said that more than one-half of the savings of the people are wrapped up, and that the comfort and welfare of the immense body of citizens, policyholders of insurance companies, are immediately concerned with the strict enforcement of the insurance contract as written, and that the comfort and security of this class of citizens is to be promoted by knowledge of the fact that a policy of insurance provided against the day of misfortune or death for those dependent upon them, means what it says, and after the death of the insured is to be paid at all events. This, however, has been a gradual growth. We find that as late as 1809 in the Supreme Judicial Court of Massachusetts counsel went bravely into an argument whether a contract of life insurance under the law of Massachusetts was enforceable in that State because such a contract was repugnant to sound morals and contrary to public policy. In referring, however, to the holding of the French courts, deciding that such contracts were illegal because they "set a price upon the life of a freeman, which is above all price," Chief Justice Parker observed that such reasoning was hardly sufficient, coming from France, "where freedom had never been known."

Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38.

Notwithstanding Chief Justice Parker's decided opinion, the contract of life insurance was long regarded with suspicion, many moralists holding that it was speculation in life, and immoral.

The validity of a contract of what is generally known as guaranty insurance, by which the insurer bound himself to indemnify an employer against the dishonesty of his employees was at one time seriously questioned, on the ground that it was the duty of all persons to employ honest agents, and that if dishonesty were insured against it would be a matter of indifference to the employer, and that to permit such a contract to be made would be contrary to public policy, as it would be an agreement to pay upon condition of the commission of an illegal act.

Fidelity and Casualty Co. v. Erchleiss, 30 L. R. A. 587.

It was decided for the first time in *Boston and A. R. R. v. M. T. and D. Co.*, 38 L. R. A. 116, after serious debate, that a contract to insure a carrier against damages awarded against it in consequence of negligent injury to passengers was valid, as it does not tend to promote negligence, although the cause of action has its origin in an illegal (negligent) act.

Trenton P. R. R. Co. v. Guarantors L. I. Co., 44 R. A. 213.

So insurance by a carrier against loss, even through negligence of his employees, is not deemed invalid as against public policy. See *Water v. Merchants, etc., Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691, *Phœnic Ins. Co. v. Erie & Western Trans. Co.*, 117 U. S. 312, 29 L. Ed. 873.

A striking illustration of the advance made along the line of public policy where the suicide of the insured caused the contract to mature is illustrated by the decisions of the courts upon this subject. From the former position that suicide, or death in consequence of violation of law in this manner, was a complete defense under all circumstances, qualification and exception have been added from time to time until the great weight of American authorities, as it is by statute in at least one State, and by incontestible clause with most of the companies, it is no longer an available defense. Such certainly is the law of Wisconsin.

Patterson v. Natural, etc., Co., *supra*, and cases cited.

Another example of strict construction is found in *Courte-*

manche v. Supr. Court I. O. of O., 136 Mich. 30, 98 N. W. 749, holding that though "the death of the insured was due to his voluntarily taking carbolic acid, yet it not having been with the intent to commit suicide, but to frighten his wife into giving him money, recovery may be had on the policy exception 'assurance against self-destruction or suicide.'"

The rule is now generally recognized which is thus stated in *Supr. Lodge M. P. Asso. v. Gelbke*, 64 N. E. 1058, 198 Ill. 365:

"Where an insurance certificate was granted on terms that if the death of the insured should be by his own suicidal act, sane or insane, the company should not be held liable unless the insured, when he committed suicide, was in such a state of mind as to be unconscious of the physical nature of the act which caused his death."

Instead of extending the rule of exemption on the ground of public policy, the courts have gone to the extent of applying a strict rule of construction to those express clauses in the contract by which the companies have sought to avoid liability in case of death by means which it might plausibly be argued would alone render the contract void on grounds of public policy.

Thus by the Wisconsin law, which is controlling in this case, *Patterson v. Natural &c. Co.*, 69 A. S. R. 899, it is held that though suicide is a crime at common law, a suicide is not to be held to have died in consequence of or in violation of law. See also *Darrow v. Family Fund*, 116 N. Y. 537, 15 Am. St. Rep. 430.

The following cases further illustrate the principle:

A life policy contained a provision rendering it void if the insured should die in consequence of his violation of any law. The insured was killed by H. shortly after having had illicit intercourse with the wife of H. Held that though the act was a violation of the law, since he did not die in consequence of it within the meaning of the policy, the policy was not avoided thereby.

Gootzman v. C. Mut. Ins. Co., 3 Hun. (N. Y.) 515.

See also *Harpers Admr. v. Ins. Co.*, 19 Me. 506.

A policy was conditioned to be void if the insured should die while violating the law. The assured, with an accomplice, went to the State treasury and presenting pistols they demanded the money of the treasurer. He delivered the money to them and they had started away with it, and had nearly reached the outer door of the building when fired upon by a policeman and killed. Held, that policy was not avoided.

Griffin v. Western Mut. Asso., 20 Neb. 620.

This principle is well illustrated by the case of *Cluff v. Mutual Ben. Life Ins. Co.*, 99 Mass. 317 & 18, which was four times tried in Massachusetts, being twice before the Supreme Judicial Court of that State. Cluff, the insured, meeting a debtor on the public road, demanded payment and was refused. Cluff attempted to seize the horses then in possession of the debtor; the latter, incensed by this act, shot and killed the insured. It was held that although Cluff was violating the law in seizing another person's property, yet his death in that manner was not within the contemplation of the parties to the contract, which contained the usual clause exempting the insurer from loss in consequence of violation of law.

Where a policy containing a clause making it incontestible after a certain time except for specified causes, and death by suicide is not among the enumerated causes, the fact that the policy contains another clause making death by suicide a risk which the company does not assume, does not relieve the company from liability when death of assured occurs by suicide after the time named. *Wareck v. Mut. Reserve E. L. Asso.*, 62 Minn. 39; *Simpson v. L. Ins. Co.*, 115 N. C. 393; *Mut. Reserve F. L. Asso. v. Payne*, 32 S. W. (Tex.) 1036; *Supreme Court of Honor v. Updegraff*, 68 Kan. 474.

2. The course of Statutes.

2. The Legislature also have not been backward in making

provision for the protection of persons contracting with insurance companies.

We find that in order to prevent forfeitures, which were, and are, regarded with the utmost disfavor, statutes have been passed providing that no condition of the application of other paper referred to in the policy shall be valid unless set forth in the policy itself. Pa. Stat. Laws, 1881, p. 20.

The statute in Kentucky (Ky. Stat., sec. 679) provides that an application for insurance shall not be considered a part of the policy unless attached thereto. Under this statute it is held that effect will not be given to a stipulation of the application excepting death by suicide if the application is not attached to the policy, though it is declared to be a part of the contract. *Provident Sav. L. A. Soc. v. Puryear*, Adm'r, 109 Ky. 381, 59 S. W. 15.

New York, followed by other States, has gone so far as to enact that after the third year a life policy may not be forfeited by failure to pay any premium or dues, but that the reserved value shall be used in extending the insurance.

3 Rev. Stat. 8 Ed. p. 1688.

The rule of law avoiding insurance policies in the event of a breach of warranty, and which has worked great hardship upon careless policy-holders, has been generally abrogated by statute, declaring that no policy shall be forfeited by reason of a breach of warranty, unless the fact of warranty was material or the statement fraudulent.

2 Cooley Briefs on Ins. 1189; 3 Id., 1983 and 1984.

Statute prohibiting the insurer from setting up the suicide of the insured in defense of a claim under the policy.

Mo. Rev. Stat., sec. 5982.

3. The course adopted by the companies.

3. The insurance companies themselves have kept up with the progress of thought requiring strict performance on payment of premiums. In the article on Insurance Life in Vol. 9, *Encyclopedia Americana*, we find that the immense growth

of life insurance in the last fifty years in the United States is due to the efforts to devise methods which would make it more popular and reliable and to divest it of onerous burdens. The contracts between the old and new methods is thus strikingly stated:

"It was formerly the custom, not only in Europe, but in America, for life insurance companies to keep the widows and other beneficiaries of deceased policy-holders waiting for periods varying from three to six months after the death of the breadwinner before the money in the policy could be availed of, while lawyers searched for reasons to escape payment. In America the practice has become almost a dead letter. Companies which do not unhesitatingly pay at once upon the death of the assured cannot hold their own in competition. * * * Another concession of the American companies to the rights of the assured has been what is known as the incontestible feature, by means of which the company estops itself from making any resistance to the policy on any ground whatever, except non-payment of premiums, after the policy has been in force one year. This has been one of the most logical and at the same time reasonable reforms in American life insurance. It has abolished the narrow practices which too often characterized the actions of life insurance societies in former times."

The companies themselves would be most vitally concerned in maintaining any sound principle of public policy on this subject. The large amounts they have paid McCue's estate shows how the best of them regard it.

Thus we see that the wisest consideration which has been bestowed upon the subject has induced the companies themselves to give up the right to make defenses—many of these defenses, too, we know, it was firmly held, were required by principles of sound public policy, and, when given up, the disposition of the courts is to hold them to the letter of their engagements. It is needless to inquire whether good or bad results have followed from adopting this policy. From the standpoint of the public, the result has been, as stated in the same

article mentioned above, that in 1902 there were probably twenty million persons holding policies in the American companies, and in fifty years the business has grown so that, whereas the entire assets of the fifteen companies doing business in the United States amounted in 1852 to a little over \$7,000,000.00, the assets of the companies reporting to the single State of New York in 1902 were over two billion, a sum fifty per cent. greater than the national debt of the United States, and over ten times the combined capital of all the State and National banks of the City of New York.

The foregoing facts convince us that the public does not view with alarm the determination of the companies to pay as they have promised, and the determination of the courts and of the Legislature is to enforce that promise, even in spite of some alleged principle of public policy behind which they might seek to protect themselves.

Respectfully submitted,

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Dec. 18, 1911.

H. B. Walsh
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